THE LAW REPORTER.

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METCALF'S REPORTS.[1]

These volumes merit a public notice, and will well repay a critical examination. They contain the decisions of a high judicial tribunal of the various questions which spring up in every day life, from the conduct and dealings of a large, intelligent, enterprising, commercial, manufacturing, and agricultural community. They define the limits of legal right and legal liability. They contain accounts of prosperous enterprise, of ruinous adventure, of domestic feuds, and of the miseries of crime. They present the people, the bar, and the bench, as they think, and speak, and act in the drama of life. The reporter, Mr. Metcalf, is one of the soundest, most accurate and learned lawyers of our country. His taste, habits, and powers of mind are peculiarly adapted to legal investigation and analysis. He belongs to a class of lawyers, whose number at the present day, it is a matter of regret is but small, and which seems to be in danger of becoming extinct. They are men who deal with principles, who love the law as a science, who devote themselves with zeal and in earnest to its study; who seek not the shouts of senseless popular applause, but are content with the respect and esteem, which are surely, but slowly and noiselessly, earned by excellence in the profession of their choice.

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[1] Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Theron Metcalf. Volumes I. II. III. IV. Boston, Little & Brown, 1841 — 1843.

This spirit of zealous devotion to jurisprudence, is indispensable to sustain and carry any one through the evils and discouragements, which always and inevitably beset the path which leads to a commanding eminence in the law. We believe it would be for the public good, as well as for individual usefulness and distinction, if more of this spirit were found actuating the profession at the present day. We are apt, and sometimes perhaps without good reason, to compare the present unfavorably with the past. The faults and errors of the present rise up in full and distinct view before us, while those of the past are more dimly and imperfectly seen. But there are many facts and considerations, which lead to the conclusion, that the profession of the law at the present time is not advancing, if it be not declining in sound, thorough learning, in habits of deep and original thinking, close reasoning, critical analysis, in judicial eloquence, and all the elements of professional eminence. Though such be the truth, it may be difficult distinctly to point out the causes, which produce the result. The character of a class or profession in a community is formed or changed by silent and unseen influences, whose existence is discovered only by their effects. But changes in the character of every community as a whole, and of the different and distinct classes and professions of the community, are constantly going on. Successive generations have their peculiar and distinctive characteristics, varying from the characteristics of the generations which have gone before them. The common expression of "spirit of the age," has its origin in just observation, and imports an important truth, which should be carefully considered by all who would form just views of the condition and prospects of society. The course and character of legislation are essentially influenced by this spirit of the age. At one period legislation is cautious and conservative, and at another rash and innovating. At one time it proceeds on wise and liberal principles to advance the great interests of society; at another its course is narrow and illiberal, interposing hindrances, rather than affording encouragement to public improvement.

This spirit of the age finds its way even into the temple of justice, and happy will it be for our country if the spirit of the present age shall leave unimpaired the noble body of constitutional law, which has been gradually formed by the learning, integrity, and wisdom of our national judiciary.

It is naturally to be expected that this spirit will be felt by the profession of the law, a profession which is occupied with the affairs of active life, and comes constantly in contact with the busy world. The prevailing disposition to accomplish everything hastily

and at once, is unfavorable to that patient and persevering labor, which is indispensable to large and solid attainments in jurisprudence. Everything must be done in a day. Men must go round the world in a day, grow rich in a day, and become lawyers in a day. The period heretofore prescribed for study and preparation for the practice of the law, was not in accordance with the impatient temper of the times. The ancient and established rules, therefore, on this subject, have been abolished in Massachusetts and other states, and men, young and old, rush into the profession, as if a knowledge of the law were a gift of nature. But some branches of the law present great obstacles in the way of such jurists. Special pleading, for instance, is a science to be acquired only by careful and persevering study and labor; to master it is a work of diligence, and of time, and a work which dulness cannot accomplish. Special pleading has therefore been abolished, and in its place has been substituted a standing libel on the law as a science, called a specification of defence. Nothing more can be needful to establish the fact of the decline of legal science among us, than the exhibition of a modern, loose, misshapen specification of defence. The great beauty of this substitute for pleading is, that anybody and everybody can make one. There is no one too dull, and no one too ignorant, to make a specification of defence. But, like other things thus easily made, it is really good for nothing when made. It specifies everything in general and nothing in particular, so that, in truth, no one is any wiser for it. It amounts, in general, to saying that the plaintiff must prove his case, and that the defendant will set up in defence everything which can be previously thought of, or which may be suggested at the trial. It properly belongs to a rude, unscientific age, and is abhorrent to a disciplined mind, trained to legal accuracy and precision, and familiar with the admirable logic of special pleading. Whatever may be thought of the utility of special pleading in the administration of justice, it certainly furnished an excellent exercise for the mind, and was an admirable test of legal capacity. It made good lawyers.

The fact that the American Jurist has been discontinued, and discontinued for want of support, strikingly manifests how little devotion there is at the present day, in the legal profession, to legal science. This quarterly, devoted to jurisprudence, had been published in Boston for fourteen years; it was ably conducted — was the only legal quarterly in New England, but there was not sufficient interest taken in it by the profession to keep it alive. After having well and faithfully performed its office for fourteen years, in the midst of a large and constantly and rapidly increasing body of

lawyers, without opposition, without a rival, it died of neglect. Our own journal, which owes its success, probably, in some measure, at least, to its more practical character, was intended to occupy a different field, and not to conflict with the Jurist.

The indifference with which the learned profession of the law has witnessed the departure of its organ, certainly does not evince a very deep interest in professional discussion and research, or a very ardent desire for the advancement of jurisprudence. It is essential and indispensable to the advancement of a learned profession, that it should have periodicals of its own. These are the appropriate channels of communication between those engaged in the same pursuits. Through these, mind can act on mind, and the active and inquiring spirit can rouse other spirits to activity and inquiry. A periodical may be a storehouse of rich and various materials, the products of many and different minds, and which, without such place of deposit, would be wholly lost. The present age is remarkable for the number of its periodicals. The world is flooded with them. For the legal profession to be without such publications, would manifest a state not only of deplorable, but of hopeless depression. We are glad, therefore, to see that, though the Jurist is wanting to us, yet that similar publications have come into being in other parts of the country. The American Law Magazine, at Philadelphia, has creditably sustained itself through a year or more. There is also the Pennsylvania Law Journal, and the Legal Observer, at New York, though we regret to learn that the Themis, which we hoped would be successful and useful, has been relinquished. There is also the South Western Law Journal, at Nashville; and the Western Law Journal, at Cincinnati, the latter under the editorial care of the Hon. Timothy Walker, whose name is a sufficient guaranty that the work will be ably conducted. These are all of recent origin. How well or how long they may be sustained, remains to be proved. We sincerely and heartily wish well to them all. We hope they will awaken higher and nobler aspirations in the legal profession, and increase their devotion to the science of jurisprudence. No country upon the earth, and no age of the world, ever furnished a finer field for usefulness to jurists, than our own country at the present day. They should be men not mixed up with party politics and party strife, but devoted to the law, and to the pure and faithful administration of justice; possessing the confidence of the community for their learning and integrity, and alive to all questions touching the security of our free institutions, and the preservation of the rights and privileges of the people. We have six-and-

twenty distinct and separate governments, and a general government embracing them all, and all designed to be emphatically governments of law, with constitutions which the people have deliberately formed and adopted for themselves. Questions, therefore, of the utmost importance, affecting not only the rights and interests of a particular state, but questions which grow out of the relation which one state bears to another, and which an individual state bears to the union of states, are constantly springing up, and more particularly address themselves to that body of men, whose more especial duty it is to study and understand the laws and institutions of the country.

Within a short time, questions in regard to certain principles and provisions of the constitution of government sprang up in our sister state of Rhode Island, to settle which the people of that state actually resorted to arms. It is a startling fact, that, in the midst of the light, knowledge, civilization and religion of the middle of the nineteenth century, the people of Rhode Island actually armed themselves and took the field, with all the "pomp and circumstance of war," to settle certain questions touching certain constitutional and political rights and privileges. One life only, we believe, was lost. We thank heaven, that the discussion in this form proceeded no further. At the present day and in this country, these are questions to be settled by the power of mind, and not by the power of muscles. They address themselves to the sages of the law, and not to the commanders of troops. They are subjects on which men should reason with and persuade, and not fight and kill, one another. The pen and the press, and not the sword, are the instruments to be used in such a case. In no equal amount of population in our country, are there more able men to be found than in Rhode Island. By some of them, the subjects in controversy were ably treated. But we believe that fifty years ago, an occasion so important and exciting would have summoned the best minds throughout our whole country to a consideration of the subjects in controversy, and that light would have been poured upon the nature of our political institutions, and on the limitation and qualifications of popular rights and privileges, which would have served safely to guide the present and future generations. There should surely always be among us a body of men, ready and able to deal satisfactorily with such questions, whose character and opinion will command public confidence and respect, and guide public sentiment.

There is now pending before the country, a question of deep interest and vital importance to the whole nation. Congress

passed a law, requiring the representatives to the national legislature to be chosen in the several states by districts, and not by a general ticket. The objects and reasons of this law it is not important here to consider. They were such as were satisfactory to the two branches of congress and the president, so that the law has all the authority, which any law passed by the national legislature can have. Yet several of the states, in contempt of the general government, have trampled the law under foot, and avowedly in defiance of it chosen their representatives by a general ticket. These representatives have taken their places in the hall of congress in defiance of the law, and are now making laws by which we are all to be governed. Whether a law, formally and solemnly passed by the national legislature, while it remains unrepealed, and without any judicial decision against its validity, shall thus be set aside by any state and every state to which it is not agreeable, and whether representatives thus chosen in defiance of law, shall hold their places, and the country be thus governed by usurped authority, are questions of deep and solemn import. These questions have been discussed in congress. How they were there discussed we well understand. Unhappily they were dealt with in the spirit of party, and settled by a party vote.

They should be discussed before the country in a different spirit, and determined by different feelings, and upon different principles. If we would have our government continue to be what it professes to be, a government of law, then the laws must be respected and sustained. Such questions should be coolly, candidly, yet earnestly discussed before the country, by men whose character and learning would entitle their opinions to respect; men who would regard the support of law and sound principles as vastly more important than the triumph of party; who would regard the triumph of party, any party, over principle as a public calamity. But so great is the power of party, so blind and reckless is party spirit, that it is a heavy and ungrateful task to contend for principle against party. Still it must be done; if we would preserve our institutions and privileges, it must be faithfully and perseveringly done. Unceasing watchfulness and care are the price which a free people must pay for their freedom, and it is well worth the cost. The public good and safety, therefore, require that there should be men who give themselves to the study of the laws and constitution of our country; men of patriotism and probity, of large and just views, free from the slavery of party, who will warn the people of dangerous usurpation of power, and encroachments on their rights, and who

will fearlessly and faithfully strive to maintain the laws and institutions of the country.

But we must return to the subject immediately before us, from which we have so long wandered. We began to say something of Mr. Metcalf, of whose merits and attainments it would be difficult to speak in too high terms. He has done much for the law, and the legal profession owes him a great debt. His arguments while at the bar, on questions of law, were of a high order. They were learned, concise and clear, without deficiency and without redundancy. His argument in the case of the *Inhabitants of Dublin* v. *Chadbourne* (16 Mass. Rep. 433) exhibits not only much learning, but powers of clear and forcible reasoning and illustration. As an author and editor, Mr. Metcalf has great merits. His notes to his editon of Yelverton's reports are highly valuable, and evince great extent and accuracy of legal learning and research. It would be difficult to find any man who has a more extensive, thorough and available knowledge of adjudged cases than he has. The task of editing the edition of the laws of Massachusetts, under the authority of the legislature, was ably and satisfactorily performed by him. His digest of the five last volumes of Tyng's, and the first volume of Pickering's reports was well executed; and the volume of a digest of the decisions of the courts of common law and admiralty in the United States, executed by him and Mr. Perkins, is a work of great labor and ability, and of great use and value. Though the completion of this work has been assigned to other hands, we feel fully assured that it will be faithfully and ably accomplished, and will form a highly valuable accession to our professional libraries.

The profession and the public are perhaps hardly aware of the extent of their obligation to Mr. Metcalf, for his index to the Revised Statutes of Massachusetts. This index is constantly in the hands of lawyers, and much used by the public, and without it such a book as the Revised Statutes would be a labyrinth without a clew. It is to the lawyer, so far as statute law is concerned, what the mariner's compass is to the navigator. To make a good index to such a book, is a work which but few could achieve, and but few men during their lives, render so much service to the profession and the public, as is rendered by this single work. To be sure it is but an index, but it is nevertheless no common work. It is a work of science, and if it have any fault, it is that it is too scientific for even the learned profession in general. Besides other occasional writings, Mr. Metcalf contributed many excellent articles to the American Jurist; and if but a small portion of his zeal

in the cause of jurisprudence had been felt by the profession, that journal would have continued and flourished. His qualifications for the office of a reporter are certainly of a high order, and he has discharged the duties of the place ably and faithfully, and we believe, except in one particular, to universal satisfaction. His statements of the points decided in each case are clear, concise and accurate; setting out with precision the whole decision, and no more and no less. This part of a reporter's duty is difficult and important, and to accomplish it requires much learning and discrimination.

So liable are reporters to err in this particular, that experienced lawyers deem it unsafe to rely on the abstracts of the points decided, without a careful examination of the decision itself. The highest powers of the bar and bench are often exhibited, by a critical analysis of a class of adjudged cases, carefully defining the precise amount of each, and thus determining the result of the whole. The manner in which the reporter has performed this part of his duty, manifests that accuracy and discrimination by which he is distinguished. The statements of the facts in the cases, upon which the decisions turn, are distinct, concise, correct, and complete. It is not uncommon, in reading the opinions of courts, to find that material facts have been omitted in the statements of the case by the reporter. We have detected nothing of this in the volumes before us. The indexes to these volumes possess all the merit which would be expected from the great skill and experience, which Mr. Metcalf is known to possess in this department.

So admirably is the reporter fitted for his office, and so ably and faithfully are his duties performed, that we feel extremely reluctant to make any complaint. But we feel bound to say, that these volumes seem to us to be defective in not giving more of the arguments of counsel. The first volume has five hundred and seventy-one pages of the reported cases. Of these, forty-three only are occupied with the arguments of counsel; and these forty-three pages are made up by adding together all the small fractions of pages, where anything is set down to the counsel. There are in this volume some sixty cases, in which the names only of the counsel are given, and who appear, so far as the report goes, to have stood mute. Upon comparing this volume with the first volume of Pickering, and a volume of the Massachusetts Reports, we found that in each of the two last, about one hundred pages more are allowed to counsel than in this volume of Metcalf. The second volume of Metcalf allows just about the same share to the counsel as the first. We have not so particularly examined the other two volumes, but

should judge from a cursory examination of them, that in this particular there was no material difference in them, from the other volumes. We think, that for various reasons there should be a fuller report of the arguments of counsel. Their part, whether well or ill performed, is an essential and important part in every judicial trial, whether of law or of fact. No better mode has yet been discovered to establish judicially either fact or law, than by the agency and discussion of opposing counsel. For this service the lawyer is educated and trained. To represent the rights and interests of one party, and in his behalf, to battle with his adversary, to battle with the court, and battle with the jury, is the business of a lawyer's life, and it is surely an unquiet and troubled life enough. Now a report which omits the arguments, cannot be a full report of the case. We by no means desire that the arguments should be reported at length in every case; this should be done only in novel and extraordinary cases. But a general outline and the heads of the arguments, we think, should generally be given. Before we examine the decision of the court, we wish always to see what points were distinctly presented for decision, and what views were taken by the respective counsel; without these it is impracticable to determine whether or not the opinion of the court covers the whole case, as prepared and presented for adjudication by the counsel, who had it in charge. In reading the opinion of the court we often feel anxious to know, whether or not a particular view of the case, which seems to us as material, was presented by the counsel for the consideration of the court. It is often impracticable to ascertain the precise extent of the decision of the court, without knowing the grounds upon which the case was placed, and to which the attention of the court was directed. It is not uncommon to hear counsel complain, that points presented by them and deemed important, have entirely escaped the notice and consideration of the court. How far this may be so, can be known from the report, only by having the arguments so far reported as to show distinctly the grounds on which the case was put. We shall not, we trust, be thought to claim too much credit for the bar, by saying that their arguments ought, sometimes at least, to be of value beyond their immediate bearing on the case in hand. It is not difficult to find, in the volumes of a lawyer's library, arguments of counsel, full of interest and instruction, exhibiting learning, reasoning, and eloquence. The bar of Massachusetts undoubtedly has much talent and much respectability, but still we would not undertake to maintain that it is, at this time, particularly distinguished for high professional powers or attainments. Judicial eloquence can claim

but few votaries. But true judicial eloquence is a noble and admirable attainment. It is the exercise of the highest power of the mind addressing the highest power of the mind; it is the reason convincing and controlling the reason.

"The first and most distinguished station in the ranks of oratory must still be assigned to the eloquence of the bar." Confined as the lawyer is to the particular matter on the record, and restricted as he is by positive and technical rules, though he may not appeal to the passions, though he may not stray into the regions of fancy, there is still ample field enough for the display of the highest intellectual powers in argument and illustration. Admirable as the power of speaking well is in itself, immensely valuable as it undoubtedly is to the lawyer, it is surely surprising, that the attainment of it is not an object of more strenuous effort and ardent aspiration.

But the bar of Massachusetts is certainly entitled to credit for untiring devotion to business. They shrink from no amount of labor. Clients were probably never more carefully and laboriously served. Causes are commenced, prepared, tried before the court and tried before the jury, diligently and faithfully, and it is all good, fair, merchantable work, to be charged in account, and paid for according to the regular rules of work. But it is business, not science, not jurisprudence; but business, job-work, the learned blacksmith at his anvil. The spirit of the wharf and the exchange has invaded, if it have not taken possession of, the inns of court. Surely business must be done, and well and faithfully done; but other things must not be left undone. Every liberal and learned profession owes something to science, and jurisprudence has claims on every lawyer. The immense increase of the books of the law has a tendency to make the profession more superficial and less scientific. When the books were few, they were all thoroughly read, and the mind stored with principles, to be applied as cases should occur. But now the habit is, instead of storing the mind with principles, to fill the library with books, to be resorted to on all occasions. It is amusing to see the learned members of the metropolitan bar of Massachusetts, as the law term approaches, flocking to the law library and exploring all the numerous shelves in search of materials, with which to construct their arguments. This, surely, is all very well and proper, but the danger is, that the learning thus acquired will not be very deep or enduring, and that the habit of obtaining knowledge thus hastily, to provide for emergencies, will prevent the formation of habits of more thorough study and reflection. It is much easier to hunt through the library to find an authority or a precedent, than to resort to

principle and work out a case by the power of argument. The want of some suitable division of labor is a hindrance to exactness and accuracy of knowledge, and professional finish. A lawyer who is required to practise in all the various courts, and to attend to all the various branches of professional business, can hardly be expected to make himself as perfect a master of all the branches as he might be of a single department. But our system is not likely to be changed. It accords with the general taste and habits of our country. We must take it as it is, and it has its benefits as well as evils. Certain it is, that, under this system, eminent and admirable lawyers and judges have been formed, and may still be formed. Fuller reports of arguments, so as distinctly to exhibit their merits, would furnish an additional inducement to elevate their character. The only memorial, in any permanent form, which in general is preserved, of even the most eminent lawyers, is to be found in the reports. The reporter is the lawyer's poet; he alone records his deeds and perpetuates his fame. It is matter of regret that so little is generally preserved of the most distinguished lawyers. Men of great and powerful minds and large and various attainments, who delight and astonish their contemporaries by their efforts at the bar, pass away and leave only the faint traces of their powers to be found in the reports. No one can read the reply of Sir Samuel Romilly in the case of Hugonin *v.* Beasley, as reported in 11 Ves. Jr., without perceiving and feeling something of his extraordinary powers. The interest we feel, in reading the arguments of Hamilton, Dexter and Pinckney, is always mingled with deep regret that so little remains of the labors at the bar of such great and gifted minds. But we rejoice that some idea of their performances at the bar, can be obtained from the reports. It would indeed be well if more of the wisdom and learning of the eminent men of the law could be preserved by the reporters.

> Vixêre fortes ante Agamemnona
> Multi: sed omnes illacrymabiles
> Urgentur, ignotique, longâ
> Nocte, carent quia vate sacro.

So arduous are the official duties of Mr. Metcalf, that, to ask him to do more than his duty, may seem unreasonable. But so abundant are his stores of learning, and so entirely at his command, that he might, perhaps, append some notes and references to the reports without greatly increasing his labors. This, to be sure, we have no right to require him to do, and no right to complain if it be not done; but, in doing it, he would add another to the many services which he has already rendered to the law.

The contents of these volumes exhibit, in a very clear light, the great amount and great variety of the duties, which the court is called on to perform. It has both civil and criminal jurisdiction, and takes cognizance of matters both in law and equity, and sits as a court for the correction of errors from inferior tribunals, and as the supreme court of probate, and gives opinions upon the call of each branch of the legislature and of the governor and council. In so large a community, with such various interests and pursuits, complicated and diversified questions, affecting private rights, are constantly arising for adjudication. Neither ordinary men nor ordinary attainments are equal to the proper discharge of these high duties.

The supreme court of Massachusetts has always been an able and learned tribunal, but we doubt whether the court, upon the whole, ever stood higher than at the present time. The several members of the court are eminently able men, and are admirably fitted, by their distinctive intellectual characteristics, to act advantageously together. The essential qualities of the judicial character may be found, in large measure, upon the bench of the supreme court of Massachusetts. The opinions in these reports are drawn up fully in writing by the judges themselves, and are not the work of the reporter. This course secures an accuracy and precision which are highly valuable, and which could not be obtained merely from the minutes of the reporter. The fact, that the opinions are drawn up by the judges at their convenience, accounts for the length of the opinions in these volumes. The average length of these opinions is, we believe, considerably greater than that of the opinions in the Massachusetts reports, and in the early volumes of Pickering. This we found to be the result by comparing the opinions in the first volume of Metcalf with those in one volume of the Massachusetts, and in the first volume of Pickering. In the first volume of Metcalf the statements of the several cases by the reporter occupy one hundred and nine pages, the arguments of counsel forty-three pages, and the opinions of the court three hundred and eleven pages, the opinions occupying more than twice as much space as both the statements and arguments. Arguments by the court are not authority, this attribute belongs only to the decision. It is no part of the duty of a judge to offer an argument to show, that his decision is right. It is his province to decide. He is oracular. The decision, with such explanations and illustrations as are needed, to exhibit plainly the grounds of it, fully discharges the duty of the judge. There are undoubtedly cases of novelty and importance, which require a thorough and extended examination and discussion. But the greater part of cases, those in which there is

only an application of settled principles, an elaborate and extended opinion adds much to the labor of the judge, without a corresponding benefit to the profession or the public. A difficulty in readily finding the point decided is often a practical inconvenience attending long opinions.

The opinions in the volumes before us undoubtedly manifest much research and learning, and intellectual power and discrimination. There are many cases of magnitude and interest. The case of *Copeland* v. *The New England Marine Insurance Company*, in the second volume, establishes a most important principle in the law of insurance. By that case it is determined that a vessel insured on a voyage out and home, which departs with competent officers and crew, does not become unseaworthy, by reason of the master's becoming incompetent, in a foreign port, to command the vessel, and if the vessel sails from such port under his command, and is lost, even if through his incapacity, the underwriters are liable. This point was decided on the ground that though the master was incompetent, there was a mate on board who was competent, and whose duty it was in such case to take the command. But the court further decided, that if the mate in such case, either through want of judgment or culpable negligence, omits to do his duty, and the vessel is stranded, the underwriters are not discharged. A different doctrine, we apprehend, was formerly held on this subject. The dissenting opinion of Mr. Justice Wilde is exceedingly clear and forcible.

The case of *Carnegie* v. *Morrison*, also in the second volume, is an exceedingly instructive one. In this case the *lex loci* and *lex fori* are admirably discussed, both by the bar and the bench. We thank the reporter for the arguments of counsel in this case, and wish we had more such to thank him for.

The case of the *Commonwealth* v. *Hunt*, is novel and important. It was an indictment against several journeyman boot-makers, for an alleged conspiracy to raise wages. The law of the case was ably discussed at the bar. The opinion of Chief Justice Shaw is one of uncommon learning and power. The whole subject of criminal conspiracy is treated in a clear and convincing manner. The lines of distinction, between our law and the English law on the subject, are clearly drawn, and how far the English cases will apply in this commonwealth, distinctly indicated. This decision must remain of great and permanent value as clearly defining and settling the law upon an important subject in regard to which the law was before a good deal complicated, confused, and uncertain.

We have space only to refer to one other leading case, and that is the case of *Norris* v. *The City of Boston*, in the fourth volume. This case came before the court on a bill of exceptions taken upon the trial before the common pleas. The plaintiff was the master of a schooner from St. Johns, N. B., and sought to recover back in this suit an amount of money, which he had paid pursuant to a statute of this commonwealth, for permission to land passengers in Boston. The object of the statute was to save the commonwealth from the burden of supporting foreign paupers. The great question in the case was, whether or not the statute was in conflict with the constitution or laws of the United States. Questions touching constitutional rights and powers are always momentous. It is among the highest and most solemn duties of the judiciary, state and national, to define and maintain the just and true limits of state and national legislation. Chief Justice Shaw, in the case before us, has discharged his judicial duty in this respect in a most able and satisfactory manner.

Infallibility belongs not to the human tribunals. The names of cases doubted and overruled, embracing the decisions of the most distinguished courts, fill a volume. Lord Brougham says, no lawyer can doubt that the judgment of the king's bench, delivered by Lord Mansfield, in the great case of *Perrin* v. *Blake*, was erroneous. We regard the decision of the supreme court of Massachusetts in the case of *Portland Bank* v. *Apthorp*, (12 Mass. Rep.) as an unsound and dangerous decision. The reasoning of the court in that case is, to our mind, entirely unsatisfactory. The tax in question was a tax directly upon the property of the bank. It was not a *proportionate* tax according to the constitution, but a partial tax contrary to the constitution, and the act imposing it seems to us clearly opposed to the provision and spirit of the constitution. We believe that to levy taxes upon the principle sanctioned by that decision would be most unjust and oppressive. We hope to see that case overruled, and the constitutional limit prescribed to the legislature in assessing taxes, correctly defined and established. The decision pronounced by Chief Justice Parsons, in *Churchill* v. *Suter*, (4 Mass. Rep.) is contrary to the decisions which have since been made in England, New York, and elsewhere, and we suppose that the better opinion is, that it is erroneous.

We propose now to submit some views in regard to some of the decisions in the volumes before us.

The case of *Lobdell* v. *Baker*, in the first volume, was an action on the case, charging the defendant with having fraudulently

procured a minor to indorse a note, to give it a false credit. At the trial, evidence was admitted on the part of the defendant to show, that the defendant was a man of sudden impulses, and that within two or three minutes after procuring the indorsement, he expressed his regret that he had done so; and the court held, that an exception to the admission of this evidence was not well founded. Upon what principle or authority that evidence could be held admissible, we have been wholly unable to discover. Declarations of a party in his own favor, especially in the absence of the other party, are excluded by the most familiar principles of evidence, and it is a novel idea, that in a civil suit for damages, the legal liability of a party can depend, in any degree, upon his peculiar physiological qualities. All the court say upon the point is, "we are of opinion that the exception is not well founded." There is not the slightest intimation as to the grounds of this opinion, or upon what principle the evidence was admissible. But the court say afterwards, that the evidence will be of no importance on the new trial, that if the defendant fraudulently procured the indorsement, he cannot exculpate himself by showing that he repented; and that this evidence has no effect on his legal liability, if the indorsement was fraudulently obtained to give a false credit to the note. These positions of the court seem to us to show of themselves that the evidence was not admissible, and that the exception was well founded.

The case of *Sperry* v. *Wilcox*, in the first volume, was an action of slander. The defence was the truth of the words, to which point evidence was given. The jury were charged that if the words were spoken, they must give a verdict for the plaintiff, unless they were satisfied that the charge made by defendant was true; that the burden of proof was on the defendant to establish that fact, and that if the jury *doubted* as to that fact, they should find for the plaintiff. The court held this instruction to be correct. The amount of the decision is, that the defendant having the burden of proof to establish the truth of the charge made by him, must remove all doubt on that point, or have a verdict against him. Was this correct? The defendant stood as every party stands, who has the burden of proof; he must make out the point to the reasonable satisfaction of the jury. The evidence must preponderate in his favor, but he is not bound to remove all doubt. The usual instruction to the jury in such case is, that the party must make out the point to their reasonable satisfaction, that the weight of evidence must be in his favor, and such seems to us should have been the instruction in this case. It would tend to great wrong

and injustice, if the party who happens to have the affirmative, or burden of proof, were bound to remove all doubt. The necessity of removing all doubt, we supposed existed only in criminal cases.

The case of *Coolidge* v. *Brigham*, in the same volume, was assumpsit for goods sold and delivered, and money had and received, and a count on a special agreement. As to the count for goods sold and delivered, it appeared that after the sale the seller agreed to receive in payment the note of a third person, indorsed by the payee and another, and the buyer delivered such third person's note, on which the promised indorsements were forged. The court held, that the seller could not, upon discovering the forgery, maintain an action for goods sold and delivered, until he had returned or offered to return the note, and had thus rescinded the agreement. The decision rests upon the principle, which requires a return of goods in order to rescind a contract of sale. There is no doubt of the soundness of this principle, but its application to this case is not so clear to our mind. The only defence, which the defendant could make to the count for goods sold, was payment, and the only evidence of payment was the agreement of the plaintiff to receive a note of a particular description in payment. A note, to be sure, had been delivered, but not such a note as was agreed to be received. The defendant had failed to perform his agreement. The plaintiff had never received what he had agreed to take in payment. The plaintiff was not seeking to rescind any contract, but the defendant set up in defence an agreement, which he himself had never performed. Independent of the agreement about the note, there was a good ground of action for goods sold, but the defendant defeated the action on that ground, by setting up that agreement, though he had not performed it. True the note was not returned, but was there any proof, or legal presumption, that it was received by the plaintiff, with a knowledge of the forgery, as a payment of the account? It appears that the fact of the forgery was settled by a trial at law, the note of course went on to the files of the court, and was no longer in the plaintiff's possession. The defendant was called on to furnish evidence to prove the indorsement; he therefore knew where the note was, and had as much access to it, and control over it as the plaintiff had.

In the case of *Briggs* v. *Parkman*, in the second volume, it was decided that a mortgage of a trader's stock in trade is not fraudulent *per se*, though it is provided therein that until condition broken, he may retain in his possession and use all the mort-

gaged property, without hindrance from the mortgagee; and though there is an oral agreement of the parties at the time the mortgage is executed, that the mortgagor may sell and dispose of the mortgaged property, and apply the proceeds to his own use. It has long been settled in this commonwealth, that possession by the vendor is only evidence of fraud, and the court regard the further provisions, in this case, that the mortgagor might use and sell for his own use, as only additional evidence to the same point; and it not appearing to the court that the conveyance was fraudulent, the mortgagee held the goods against the assignee of the mortgagor. But our difficulty is, to see how any legal title or interest passed to the mortgagee by such a conveyance. The mortgagor retained not only the possession, but the right to use and sell for his own use, that is, he retained everything which belongs to absolute ownership. He had all the rights of absolute owner as fully after the mortgage as he had before. He had the right to keep, use, and sell the whole property for his own use; he might at any time have sold every particle of it, and put the proceeds in his own pocket; he was under no obligation to account for or pay over the proceeds. No man can have a greater right in or control over personal property; was it not then his, and could it at the same time be another's? Suppose a man should convey to another personal property absolutely, it being nevertheless expressly agreed at the same time, that the vendor should have the same right to keep, and use, and sell it for his own use that he had before the conveyance, would anything pass by such a conveyance? The court intimate in this case, if the conveyance had been absolute, it would have been viewed as fraudulent, but would it not rather have been a nullity? In such a case it would seem as if nothing was in fact done, and that the property remained just as it was before. In this case, as the mortgagor could sell and convey the property to his own use, and as a creditor can take what belongs to his debtor, it would seem to follow, that it might be taken by creditors by attachment, and that it could pass by assignment under the insolvent law, the possession and right to sell then remaining in the mortgagor. At the time of the attachment by the creditor and of the assignment, the condition in the mortgage had not been broken, and no possession had been taken by the mortgagee. We do not perceive that the agreement, on the part of the mortgagor, that if he made large sales he would add to the security by other property, can have any bearing on this question. The mortgagor had an unlimited right of sale without accounting, it appearing expressly that he refused to agree to account for the pro-

ceeds, and his adding or not adding to the security by other property, would not affect his right to the property mortgaged. It may be said that the mortgagor gave the mortgagee, by contract, a power to take possession of the goods upon condition broken; in that light it would amount to this, that the mortgagor agreed that if he did not pay the money within a certain time, the mortgagee might take what goods remained unsold. The most that could be claimed in behalf of such a power would be, that it could be enforced against the mortgagor while he retained the goods, but it would be of no avail after the title to the goods had passed from the mortgagor, either by a voluntary conveyance, or by process of law. We are aware that the decisions of courts have gone great length in supporting mortgages of personal property, but we are not aware of any case, which goes the length of the case before us. It has been held, that the mortgagor may sell for the mortgagee, paying over the proceeds to him. If it be the policy of the law, that creditors should be able to take, by legal process, what belongs to their debtors, the principle of this case would seem to be against such policy. A debtor, on this principle, by an arrangement with one creditor, may have in his possession, to be disposed of as he pleases, for his own benefit, property to any amount, but which is at the same time out of the reach, as well of the particular creditor with whom he agrees, as of all the rest of his creditors, none of whom may in fact receive any benefit from the property. But we do not mean to speak too confidently in regard to this case. It certainly puzzles us extremely to comprehend how the owner of a chattel can give any title to or lien upon it to another, and at the same time retain to himself the right to keep, use and sell it for his own use and benefit.

The authority of this case was fully recognized in *Jones* v. *Hugeford*, in the third volume, and the general views taken by the court were the same in both cases.

Bard v. *Wood*, in the third volume, was an appeal from a decree of the judge of probate. The supreme court decided that an administrator, who is cited, on the application of the heirs of the intestate, to render and settle his account of administration in the probate court, will be held to do so, although he produces the receipts of all the heirs, acknowledging that he has paid them their distributive shares in full. The amount of this is that a settlement made by an administrator with the heirs and their receipts obtained in full, go for nothing; and he is bound to render and settle an account as if nothing had been done, without any evidence being previously offered to show that there were any errors, or

mistakes, or fraud. Ought not the settlement and receipts to be *prima facie* good and binding, and ought not the burden to be on the heirs to show that in the settlement, which they have voluntarily made, there are errors, or mistakes, or fraud? And if they show errors and mistakes, let them have leave to surcharge and falsify, and let the administrator be held to account for all matters, for which he had not accounted, and if there were fraud, let the whole settlement be set aside. Do not the heirs waive their right to have an account under oath, by a voluntary settlement fairly made?

Pidge v. *Pidge*, in the third volume, was a libel for a divorce, *a vinculo*, founded on the statute 1838, ch. 126, sec. 1. That section provides that "a divorce from the bond of matrimony may be decreed in favor of either party, whom the other shall have wilfully and utterly deserted, for the term of five years consecutively, and without the consent of the party deserted." The facts were that the husband abused and beat his wife, so as to furnish a justifiable cause for her leaving him; and she did leave him for such cause, and did not return or offer to return to him, and he for five consecutive years next after her departure, wholly neglected to provide for her maintenance, and did not seek to live with her. Upon these facts the court held that the wife could not maintain a libel *a vinculo* under the above statute. The view taken of the case by the court, as expressed in the opinion delivered by Mr. Justice Dewey, is, that the facts proved, show a case of extreme cruelty and wilful neglect to provide for the maintenance of the wife, which would warrant a divorce from bed and board, but that it is not a case of desertion under the above statute. Mr. Justice Putnam, however, gave a dissenting opinion. The view he takes is, that the husband in effect turned the wife out of doors, without any reasonable cause or provocation, and without her consent; and that he there left and abandoned her to her fate, without his aid, protection, or support, for five consecutive years, and that that is desertion within the spirit and meaning of the statute. That the parties were separated not by consent, one therefore must have deserted the other. That the wife did not desert the husband; she was in no fault, and that the husband must therefore have deserted the wife. We confess it seems to us extremely difficult to resist this conclusion.

Now that Mr. Justice Putnam has retired from the bench, and we shall not again meet him, as we have been accustomed to do, in the walks of professional life, we hope we may without impropriety take this occasion to pay him a passing tribute of unfeigned respect. For nearly thirty years, we believe, he discharged ably

and faithfully the duties of a judge of the supreme court. Many of the opinions delivered by him, especially upon questions of maritime and commercial law, are among the best which have eminated from that distinguished court. No judge ever maintained his own opinions with more firmness than he did. Supported or unsupported by the opinions of others, he pronounced with manly frankness and independence the convictions of his own mind. His dissenting opinions were uniformly exceedingly able, and evidently showed that they had been carefully and conscientiously formed. But the trait of character to which every lawyer will with pleasure refer, was his uniform courtesy and kindness. In court and out of court, and at all times, he was a gentleman in the highest acceptation of that term. Happy is the man, who, at the age at which Judge Putnam has arrived, can look back upon a life as honorably and usefully spent as his has been. There is not a shade resting on his fair fame; and now that the cares and the toils of official life are ended, may the remainder of his days be peaceful, and happy, and honored.

The case of *Monk* v. *Guild*, in the third volume, was a writ of error to reverse a judgment of the court of common pleas in favor of *Guild* v. *Monk*. The error assigned was, that Monk, prior to the service of the writ, had removed his domicil from this commonwealth to New York, and which continued to be there; and that no attachment of his goods, &c., was made on the original writ. The facts agreed were, that Monk removed his domicil, as above stated, from Massachusetts to New York, where he had ever since continued; that said removal was unknown to Guild. The judgment was rendered on a promissory note. The officer returned on the writ, that he had made diligent search for property and person of Monk, but could find neither in his precinct; and that he attached a billet of wood and left a summons for Monk at Mrs. Cole's, that being his last and usual place of abode in this commonwealth, not being able to find any agent or attorney of said Monk in this commonwealth with whom to leave a summons. On the entry of the action, Guild suggested on the record, that Monk was out of the commonwealth, and took an order of notice in the usual form. At the second term, the order not being complied with, Guild took an order of notice in the alternative, which was served on Monk at his residence in Troy, N. Y., by reading to him an attested copy of said order. Prior to the first term in September, Monk directed an attorney to appear generally in defence of said suit, but the attorney did not appear till the April term following. He then appeared and moved the court

to dismiss the action for the reason stated in the assignment of errors; the motion was in writing. The court of common pleas refused to grant the motion, and the attorney then *withdrew his appearance.* Judgment was therefore rendered and execution issued, which was wholly unsatisfied. The decision of the court was, that the plaintiff in error takes nothing by his writ.

The decision is founded upon the principle, that when a plaintiff in error might have appealed, and did not do so, he cannot have a writ of error. The court of course consider that the plaintiff in error, in this case, might have appealed, and that it was his own laches that he did not do so, and that therefore he cannot have his writ of error.

The principle stated by the court is no doubt a correct one, and well established; but the question is, does it apply to this case? How stands the case? At the time of the date and service of the writ in the original suit, the then defendant — now plaintiff — had no domicil in this commonwealth, was not an inhabitant here, and was not in fact here, and of course the court had no jurisdiction of him. His attorney appeared only for a particular purpose; he then withdrew his appearance entirely. There was then no appearance, and the case of course stood as if there had been no appearance at all for any purpose. The judgment, therefore, was rendered against a man who was not an inhabitant of the commonwealth when the suit was commenced, or at the time of the judgment; on whom the writ had not been served, and who never appeared in the action. The party not being an inhabitant of the state, was not bound to appear on notice, and he did not, in legal contemplation, appear, — as the appearance was for a particular purpose, and was wholly withdrawn. The court expressly say, "that if the defendant in the original suit was not duly summoned, his appearance by an attorney to take exception and make a motion to dismiss the action, was not a waiver of his exception." Can there be any doubt, that the judgment in the original suit was erroneous, and ought to have been reversed in the suit in error? But it was not reversed, on the ground that the party might have appealed. But how could he appeal, what opportunity had he to appeal? The writ was not served on him, and he was not an inhabitant of the state, and did not appear to the action, and was not in court. The court say: "The rule that he who has a right to appeal, shall not bring error, applies of course to cases only where the party had an opportunity to appeal. If he never appeared, or was never duly summoned, and judgment was rendered against him by default, the case would be very different." Now, the case

thus put, was precisely the case of the plaintiff in error then before the court. It would seem quite clear, therefore, that this was not a case for the application of the rule that the party cannot have a writ of error where he has an opportunity to appeal, and that the true position of the case was not presented to the mind of the court. So far as appears from the report, the counsel said nothing, but left the court to find out the points in the case as well as they could.

In *Charles* v. *Dunbar*, in the fourth volume, the court held, that a first mortgagee, who makes an entry for condition broken, according to the provisions of the Revised Statutes, ch. 107, sec. 2, but permits the mortgagor to remain in possession as before, without accounting for rents and profits, does not render himself liable to account with the second mortgagee for the rents and profits, although he makes such entry for the purpose of preventing the creditors of the mortgagor from attaching the crops growing on the mortgaged premises.

The view taken by the court in this case is, that the mere entry by the mortgagee, for the purpose of foreclosure, was merely formal, and that he never was in fact in possession; that the entry and record did not estop him from showing that he never was in possession in fact, and as he might abandon the possession taken by the entry without fraud, he would not, by reason of his entry, be treated as one, who by his conduct induced another to part with his property, or to forego the enforcement of his rights, and that it was the duty of the second mortgagee, if he would charge the first with the rents and profits, in such a case, to take further steps, by attempting to enter under his own mortgage, or by tendering the debt due to the first mortgagee.

But there was no evidence in this case that the mortgagee had abandoned his possession, except his allowing the mortgagor to occupy the premises. If a creditor of the mortgagor had attempted to attach the crops, no doubt the mortgagee would at once have set up his possession, because he had taken possession to prevent such attachments. The true view of the case seems to us to be, that after the entry of the mortgagee, if he allowed the mortgagor to remain on the premises, the mortgagor was in possession under him, according to the words of the fifteenth section. Surely the abandonment of the possession formally taken for the purpose of foreclosure, is not to be inferred from this single circumstance of his allowing the mortgagor to occupy; if it were, it would defeat the very object for which the entry was made. After the first mortgagee had entered and taken possession, what

right had the second mortgagee to enter on him, or attempt to enter, and take possession; and what reason had he to suppose the first mortgagee had abandoned his possession? Would it not be more reasonable to require the first mortgagee to give express notice, or indicate by some decisive act, that he had abandoned his possession, than to deprive the second mortgagee of his rights, because he did not do, or attempt to do, what he had, apparently at least, no right to do.

The first mortgagee appears to have been able to keep off attachments because he was in possession, and avoid accounting for rents and profits, because he was not in possession. Every man must be supposed to act lawfully, where the circumstances will warrant such supposition, and as the first mortgagee entered and took possession to keep off attachments, he must be presumed to have retained that possession, and to have allowed the mortgagor to occupy under him, otherwise he would be deceiving and defrauding the creditors of the mortgagor. The second mortgagee is in fact the mortgagor to the first mortgagee, and has all the rights of a mortgagor, one of which is to make the mortgagee in possession accountable for the rents and profits. Before the entry of the first mortgagee the mortgagor was tenant at will to the second mortgagee. When the first mortgagee took possession, that relation was destroyed, and the mortgagor became tenant to the first mortgagee, and the second mortgagee had lost his power of entry on the mortgagor. The taking possession by the mortgagee was a lawful act, and could not be invalidated by his intending to allow the mortgagor to retain the possession. After the entry, the mortgagor was in under the mortgagee by his express consent, and therefore his tenant. Until the entry, the mortgagor was not accountable for the rents to the mortgagee. After the entry he became so accountable — though if there had been no second mortgage, the liability for rent would have been only formal, as there could have been no difference between paying rent and paying so much of the mortgage debt; yet the right of the second mortgagee intervening, it seems to us that the first mortgagee is just as much accountable for the rent, as if he had taken possession, and put a stranger in under him. If a mortgagee takes possession and puts a stranger in, he is accountable to the mortgagor for rents and profits. Now the second mortgagee is the mortgagor to the first mortgagee, and if the first mortgagee takes possession, it seems to us that he must account for rents and profits to the second mortgagee, just as much if the mortgagor is permitted to remain in, as if a stranger were put in.

We should be exceedingly glad to know how this case was treated by the distinguished counsel, who are stated to have argued it before the court, but of whose arguments not a word is given in the report.

We have thus briefly considered some cases in the volumes before us, in which the accuracy of the decisions appeared to us to be at least doubtful. These cases are very few in number, and if the decisions in them were all erroneous, it would surely be no matter of surprise or complaint, considering the great amount of business with which the court is constantly pressed, and the unfavorable circumstances, under which causes are often necessarily heard and determined. In truth, irrespective of any unfavorable or embarrassing circumstances, erroneous decisions are to be expected in every court, and all courts. The best judges have often been those, who were most sensible of their liability to err, and were most ready to admit and correct their errors.

There are many cases which fairly admit of different views, and cases present themselves to different minds, under different aspects, as is every day seen by the different decisions of the same question by different courts. If there were a court of errors in Massachusetts, they would no doubt, rightfully or wrongfully, reverse some of the decisions of the supreme court. There would be different opinions. It was not our purpose, nor do our limits allow it, to go into any extended discussions of the several cases, or examination of authorities. Our remarks, of course, can have no weight, except so far as they may appear to be sound and just; and they are made with entire deference to the learned judges of the supreme court, for whom and whose decisions we entertain the highest respect. We deem it essential to the advancement of jurisprudence that habits of critical examination of legal questions and subjects should be cherished in the bar, and that the opinions and decisions of courts should be respectfully and candidly, but freely considered and discussed.

We hope the people of Massachusetts will appreciate as they ought, and by wise and prudent measures, perpetuate an able and upright administration of justice among them, such as at the present time they so fully enjoy.

Note. On page 11 of this article there is a mistake in the citation of the case from Vesey. It should be *Huguenin* v. *Baseley* (14 Vesey, 273.)

Recent American Decisions.

District Court of the United States, Vermont, April, 1844. In Bankruptcy.

IN THE MATTER OF DELUIS WELMAN.

The time when an Act of Congress, which is approved and signed by the President of the United States, takes effect, must appear and can properly appear, only from the Act itself.

Held, that a petition for a declaration of bankruptcy, presented on the third day of March, 1843, was too late and must be dismissed.

The doctrine of this court in the *Matter of Howes*, (6 Law Reporter, 297,) restated and affirmed. [But see the *Matter of Richardson*, (6 Law Reporter, 392.)]

THIS was a petition by Deluis Welman, representing himself to be unable to meet his debts and engagements, and praying for the benefit of the bankrupt law. The petition was filed March 3d, 1843, and no proceedings having been had upon it in consequence of the clerk's refusing to issue the usual order, the petitioner now filed his motion for an order of notice to creditors and others to show cause why he should not be declared a bankrupt.

PRENTISS J. In the matter of *David Howes*, (6 Law Reporter, 297,) it was determined by this court, that a petition for the benefit of the bankrupt law, presented and filed on the 3d of March, the day the law was repealed, was too late, and that no order could be taken upon the petition other than to dismiss it. An opposite decision having been recently pronounced in a neigboring circuit, I am now called upon to re-examine the question; and I can very freely say, that it is not at all a subject of regret, that an opportunity is thus afforded me to review my former opinion, and to overrule it if found to rest on mistaken principles or unsound reasoning. When Lord Hardwick, having reason to alter his opinion on a particular occasion, said he was not ashamed of doing so, for he always thought it a much greater reproach in a judge to continue in his error than to retract it, he exhibited an example of true wisdom and real elevation of character which it would be well for all judges to take as a guide. I hope I am capable of appreciating, as it deserves, this high example of judicial intelligence and virtue, and that I shall never be so forgetful of what is due to

an enlightened and scrupulous discharge of duty, as to fail to follow the example on every fit and proper occasion.

The question presented in this case first came before me at the last May term of this court, in the matter of *Ward and Thrall* v. *Slosson*, a case of compulsory bankruptcy. I then considered the question, and came to the conclusion that the petition could not be sustained; but as the case involved property to a large amount, and the question raised was one of some novelty and much importance, I thought it would be advisable, especially as there were several other cases depending upon the decision, to adjourn the question into the circuit court for final determination. I accordingly did so; but no hearing being had upon the question in the circuit court, the counsel for the petitioning creditors at the October term declining to proceed further upon it, and the case of *David Howes*, coming up soon after, I delivered the opinion I have already mentioned. As to the correctness and soundness of that opinion, considering the question as a question of law depending upon rules and principles of law, I certainly entertained no doubt before the publication of the decision in the matter of *Joseph Richardson*, (6 Law Reporter, 392.) I have carefully read that case, and well weighed the authorities, principles, and reasoning urged in it. The decision, considering the high source from which it proceeds, is entitled to high respect and deference; but like all other decisions under the bankrupt law in other circuits, it is of no binding authority here. Notwithstanding all that is urged in the case, I am obliged to say, that I still remain of the opinion, that a petition, presented and filed on the day the act repealing the bankrupt law was passed, cannot be sustained.

It appears to me, that the rule that there are in law no divisions or fractions of a day, if applicable to any question whatever, is emphatically applicable to this. The rule, in my apprehension, is not to be treated as a mere unmeaning legal fiction, existing in speculation and theory only, and of no practical use or value. That there is no apportionment of a single day, or any account made of hours and minutes, besides being true by general habit and custom in the transaction of much of the business of life, is a rule or axiom of law founded in convenience and utility, and is of real practical efficacy, as far as it prevails, in avoiding the uncertainty and difficulties attending questions concerning minute and unimportant divisions of time. Still, the rule, though a general rule of law, does not apply in all cases, but, like most other general rules, is subject, in its application, to just and reasonable exceptions. It does not prevail in questions concerning merely the acts

of parties, where it becomes necessary to distinguish and ascertain which of several persons has a priority of right; as where a bond and release are executed on the same day; where a bond is executed by a woman the same day she marries; where the disseisin is done the same day the writ is tested; where goods are seized under an execution on the same day the defendant commits an act of bankruptcy; where two writs of execution are delivered to the sheriff on the same day; or where the question is as to the time of suing out a writ or delivering a declaration; in short, in most, if not all questions respecting private transactions, where priorities in a single day may exist, and it is practicable as well as essential to the purposes of justice, to inquire into them.

But though divisions of a day are allowed to make priorities in questions concerning private acts and transactions, they are never allowed to make priorities in questions concerning public acts, such as legislative acts or public laws, or such judicial proceedings as are matters of record. When it was the law in England that every act of Parliament, took effect the first day of the session unless the act appointed another time for its commencement, it was held, that in case of two acts made at the same session, one could not have priority over the other, for being made at one day, and instant in contemplation of law, they should be construed as if all was in the same act. So in regard to judgments, while they were considered as rendered on the first day of the term unless there was some memorandum to the contrary, the same principle prevailed. In *Pugh* v. *Robinson*, (1 Term Rep. 116,) Buller J. said, there being no fractions of a day in judicial proceedings, where there are two judgments, both referring to the same day, the priority of one cannot be averred. The doctrine undoubtedly holds equally good under the modern regulations, which require an indorsement to be made upon every act of Parliament of the day of its being approved by the crown, and an entry of record of every judgment of the day when signed.

Lord Mansfield, in *Combe* v. *Pitt*, (3 Burr. 1423,) recognizes and admits the general rule. After observing that the law does not, *in general*, allow of the fraction of a day, he says it admits it in cases where it is necessary to distinguish, and he does not see why the very hour may not be shown, where it is *necessary* and *can be done*. To this I agree. But is it necessary, and can it be done in this case? That is the question. If it cannot be done, or is not proper to be done, then the case falls within the general rule, and the general rule must govern it. It seems plain to me, that the time when an act, which is approved and signed by the

President, takes effect, must appear, and can properly appear only from the act itself. By a standing general enactment, the act, when approved and signed, is to be forthwith lodged in the department of state and published; and the act so lodged in the department of state, or a certified transcript or authorized printed copy of it, is of course the only proper evidence, not only of its existence as a law, but of the time of its commencement; though it may be necessary and admissible in some instances, particularly when an act becomes a law by not being either signed or returned with objections, or by being returned and repassed by congress, to carry back the inquiry to the legislative journals. But it would be as unsafe, as it would be unfit, to allow the commencement of a public law, whenever the question may arise, whether at a near or distant time, to depend upon the uncertainty of parol proof, or upon anything extrinsic to the law and the authenticated recorded proceedings in passing it. In the case of *Latless* v. *Holmes*, (4 Term Rep. 660,) which arose upon an act to take effect from and after its passage, it was determined that the time when the act passed could be known only by reference to the statute book. That would seem to be the sound and true doctrine upon the subject; and it appears to be fully confirmed by the observations of Lord Tenterden in *Rex* v. *the Justices of Middlesex*, (2 Barn. and Adol. 818.) where, speaking in reference to the time when acts of parliament were considered as referring to the first day of the session, he says, that if two acts, passed in the same session, were repugnant, it was not possible to know which of them received the royal assent first, for there was then no indorsement, as there is now, of the actual day on the roll.

As already suggested, now, in England as well as here, the operation of every act commences from the time of its approval by the executive, unless it is otherwise provided in the act. By the statute 33 Geo. 3, c. 13, it is enacted, that upon every act of parliament, the *day*, *month* and *year* of its receiving the royal assent shall be indorsed, and such indorsement shall be taken to be a part of the act, and to be the date of its commencement, when no other comment is therein provided. The matter here, under the provisions of the constitution, or the practice of the government, as to the time when a law takes effect on being approved and signed by the president, is, in my judgment, placed upon no different footing. Neither in such case, any more than in the case where a law takes effect on being returned by the president with objections and repassed by congress, or on not being signed or returned within ten days after being presented to him, are any divisions of a day either implied or

contemplated. The president has a right to retain a bill ten days for consideration, and if he approves it on any day within that time, he indorses the *day* of its approval upon the bill. The hour of the day, according to uniform and uninterrupted usage, never appears — for the reason, undoubtedly, that it is considered the same in legal effect, and consequently immaterial, whether the approval is upon one moment of the day or another. All we know, or can judicially know, is what appears from the date of the approval, which is a part and an essential part of the act, and anything beyond that we have no legal means of knowing. It is legally impossible, therefore, to distinguish between different parts of the day, if it was admissible to do so; and I must add, that I cannot see either the fitness, propriety, policy, or necessity, of introducing into the law, if practicable, the anomaly of making a repealing act, and the act repealed, both in force and operation on one and the same day — one act on one part of the day, and the other act on the other part of the day.

So far as it concerns the commencement or termination of public laws, a day is an indivisible portion of time; and, I repeat, it would be unfit, inconvenient, and serve no valuable purpose, in my opinion, to have it otherwise. Of what practical importance can it be, whether a law takes effect on one or another part of a particular day? If it be meant that no law should go into operation, before the people have had the means of knowing its provisions, the proposition is a plain one, and easily understood; but it is not so easy to see or understand how it can be very material, so far as it respects the people's knowing or having the means of knowing the law, whether it takes effect the first or last part of the day on which it is approved. Whether a law ought to be made to take effect immediately on its passage, is a matter very proper for the consideration of the legislature. All laws, before they become such, pass through several stages, and are usually very slow in their progress. While they remain *in transitu* in congress, which is commonly a considerable time, the various proceedings upon them are spread abroad over the country through the medium of the public journals; and as it is known and understood that laws, after passing through the different legislative stages, take effect, in general, and unless it is otherwise specially provided, the day they are approved and signed by the president, there is very little reason for saying there is any surprise upon the public.

It would seem, however, to be more proper, as being more agreeable to the spirit of our institutions, that criminal laws, espe-

cially such as create new offences, or augment the punishment of old ones, should be made to take effect on a fixed future day, in order that they may be published and promulgated before they go into operation; but if made to take effect immediately on their passage, as it is generally supposed they may be constitutionally, it would be of very little consequence, as to any purpose of notice or publicity, at what part or hour of the day their operation commences. The supposition that there may, by possibility, be in point of fact, if not of law, a retrospective or *ex post facto* operation in such a case, proves, if it proves anything at all, not that we should divide the day into parts and restrict the law to the precise moment when it was actually approved, which we have seen to be impracticable, but, rather, that we should exclude the day of passing the law, which would not be impracticable, altogether from its operation; thus making criminal laws an exception to the general rule which has long obtained in the construction of statutes in this particular, and which is expressly confirmed and settled, as we shall hereafter see, by a modern adjudication of the best and highest authority. But, then, if we are to reason from supposed possible cases, we ought not to overlook the possible one of a criminal law being repealed and an act prohibited by it being committed on the same day of its repeal; and we should not be unmindful of what would be the effect, in such case, of excluding the day, or, according to a late suggestion, of suspending the operation of the repeal in judicial construction until the last instant of the day. It is easy to suppose extreme cases; but remote bare possibilities, however ingeniously put, merit but little consideration in settling a general principle.

As I have already said, the question arising in this case was first presented to me in a case of compulsory bankruptcy, which, whatever it may be in form, partakes in some measure of the nature of a criminal proceeding. I was called upon to say, whether you could coerce a man into bankruptcy against his will, divest him of all his property and rights of property, put a stop to his occupation, and break up his business, under a proceeding instituted and commenced on the day the bankrupt law was repealed. The question comprehended not only this, but also whether you could prosecute, and punish criminally, false swearing, or any other forbidden act done under such proceeding. I thought the question a very grave one, and felt its weight and importance. I thought what I have stated could not be done consistently with established legal principles; and I did not feel authorized to introduce new rules or new principles of law, or at liberty to indulge in any

subtlety or refinement on old ones, to enable me to sustain a proceeding involving such consequences.

All agree that the material point in this case is, when did the act repealing the bankrupt law take effect? The whole question depends upon that. Now, I think this point has long ago been decided and settled in this country. It was decided and settled, as it appears to me, by the supreme court of the United States, in the case of *Arnold* v. *the United States*, (9 Cranch, 104.) The question in that case was, whether a certain cargo of goods, imported into the United States, came under the operation of the act of 1812, imposing double duties. The act provided, that an additional duty of one hundred per cent. upon the permanent duties imposed by existing laws, should be levied and collected upon all goods, wares, and merchandise, which should, from and after the passing of the act, be imported into the United States from any foreign port or place. The act was approved and signed by the president on the 1st day of July, and the goods were imported into the United States on the same day. The question was, whether the goods were subject to the double duties imposed by the act; and this depended upon a decision of the question when the act took effect.

It was insisted by counsel, that the court ought to give such a construction to the act, as that no citizen could, by possibility, be subjected to its operation before it had actually passed; and that to prevent this, the court must either exclude the 1st day of July altogether, or must admit fractions of a day and suffer an inquiry into the very moment of time when the act received the signature of the president; for, if a vessel had arrived in the morning of the 1st day of July, and the act was not in fact approved by the president until the afternoon of that day, it could not be pretended that the goods brought in such vessel were imported after the passing of the act; and it was argued, that the difficulties attending an inquiry into the time when a law was approved, as well as the impropriety of calling on the president for information as to the moment when it received his sanction, might induce the court to say, that when the act was to take effect *from and after* the passing of the same, they would, as a general rule, exclude the day on which it passed.

Such were the considerations urged by the learned counsel in the case; and it will be perceived that they are substantially the same as those which have been presented on this occasion. But the court repudiated the argument of the learned counsel altogether, and held the construction contended for to be entirely inadmissible. They said the statute was to take effect from its pas-

sage, and it was a general rule that where the computation was to be made from an act done, the day on which the act was done is to be included. This was a direct recognition, that in a question as to the time when a law takes effect, there are no parts or divisions of a day. The day is to be included, because, there being no fraction of a day, the act relates to the first moment of the day on which it is done, and as if it was then done. This is the very reason given in the books for the rule the court rely upon. Instead of intimating that there could be any fraction of a day in such a question, or that it would be proper to reverse the general rule of law and consider the act in force only from the last instant of the day, the court held, that the day on which the act was approved was to be included in its operation, and that goods imported on that day must be taken to have been imported after the passing of the act, and of course were liable to the double duties imposed by it. Such was the decision; and it surely could not have been supposed at the time that the decision was at all at variance with any of the provisions of the constitution, or in the slightest degree incompatible with any of its principles or objects.

The case to which I have just referred is certainly a very strong case, and appears to me to be exactly in point. It decides, that an act which is to take effect from and after its passage, goes into operation the day on which it is approved, and includes the day. The determination is one of high and paramount authority, and, in my judgment, covers the whole question presented in the present case. Looking, then, both to principle and authority, I am not able to see that there is any substantial ground for doubt upon the matter. Still, as different views have been expressed elsewhere, and as I never wish the rights of any party to be conclusively bound by my opinion, when there is any way open for an appeal to a higher tribunal, I shall very readily allow the question, if the petitioner desires it, to be certified into the circuit court, to be there ultimately settled, and finally disposed of.

District Court of the United States, Massachusetts, April, 1844, *at Boston.*

UNITED STATES *v.* KIMBALL.

If a passenger in a railroad car or steamboat carry a letter without the knowledge or consent of the owner of the car or steamboat, or any of his agents or servants, such owner is not liable to the penalty provided by the act of congress of 1825, § 19.

The person who sends such letter by such passenger is not liable to the penalty provided in the 24th section of the said act, unless the owner of the car or steamboat is liable to the penalty provided by the 19th section.

The setting up of a post by railroad car or steamboat is not setting up a footpost, within the meaning of the statute of 1827, § 3.

THE facts in this case appear in the opinion of the court. The questions of law were argued by *Dexter*, district attorney, for the United States, and by *Fletcher* and *Fiske* for the defendants. At the close of the arguments, the judge stated the instructions which he should give to the jury, and the reasons therefor, as follows:

SPRAGUE J. This is an information to recover a penalty for an alleged violation of the post-office laws. The first, second and third counts charge, that on the 21st of February last a railroad car conveyed a letter on a post road, whereby the owners incurred a penalty of fifty dollars, and that the defendant procured and assisted in such conveyance, and thereby forfeited the sum of fifty dollars. It is admitted that the defendant on the day alleged sent a letter from Boston to New York by a person who went as a passenger in the car, and who received no compensation for conveying the letter, but that the defendant had received compensation therefor, and his stamp indicating that fact was upon the letter. The person who carried the letter had no connexion with the owners of the car or any of their agents, except as a passenger. The owners had previously advertised that they would not take passengers who should convey letters, contrary to law, and enjoined all persons in their employment not to receive the same. And neither the owners nor their agents had any knowledge of the conveyance of said letter. The 19th and 24th sections of the statute of 1825, ch. 175, are relied on to sustain the prosecution.

Two propositions are laid down by the learned counsel for the government. (1.) That under the 19th section it is not necessary that the act should be done with the knowledge or consent of the owner of the vehicle in order to subject him to the penalty. (2.) That it is not necessary that the owner should be liable, in order to make any person subject to the penalty for procuring or assisting in the doing of the forbidden act.

The first question is, would the owners of the car be liable to the penalty? The case is that of a passenger carrying a letter; and the proposition contended for necessarily goes to the extent, that if a passenger in a railroad car take a letter, either as an act of kindness or for hire, and carry the same concealed about his person or in his baggage, and without the consent or knowledge of

the owner of the vehicle, such owner is subject to a penalty. He is a common carrier, and as such compellable to take passengers and their baggage. The law has made no provision requiring them to make known to the owner the fact of their taking letters, and if he might make it a condition that their persons and property should be searched, it would be so onerous and vexatious, and so inconsistent with the genius of our government and the feelings of the people, that it could not be practically enforced. Here was perfect innocence of intention, and not even a neglect of duty. The infliction of penalties under such circumstances would not be consonant to the general principles of jurisprudence or natural equity, and it is not to be supposed that the legislature intended to do so, unless such purpose be clearly expressed. I do not think it is so by this statute. The 19th section prohibits the doing of a certain act. This implies an actor. The vehicle is but the instrument. The actor is the owner, and he is forbidden to convey letters. This, I think, means the conveying of letters as *such*, and not the conveyance of passengers who may have a letter concealed. This construction was adopted by the learned judge of the United States for the southern district of New York, in the case of the *United States* v. *Adams, et al.*

The second proposition contended for is, that the defendant may be liable under the 24th section, although the owners of the vehicle are not liable. That section provides that every person "who shall procure and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes." This section, standing by itself, is wholly inoperative. It refers to and rests upon other provisions forbidding certain acts or crimes. In the case before us it must be coupled with the 19th section, and then two actors are contemplated, one who does the forbidden act, and another who procures or assists the doing thereof, and the latter is to be subject to the same penalty as the person is subject to, "who shall actually do the act," and *to no other*. Now if there be no person who has done the forbidden act — no one subject to a penalty therefor, how can another be subject to the *same* penalty for having *procured* or *assisted* the doing thereof?

The 4th and 5th counts are founded on the 3d section of the statute of 1827, which enacts that no person shall set up any foot or horse post for the conveyance of letters or packets upon any post road. The 5th count applies only to the distance between Court street, and the depot of the Providence railroad, which does

not appear to be a post road. The 4th count applies to the railroad, and over which, being a post road, it is admitted that the defendant did not set up a *post* for the conveyance of letters. But was it a foot post as alleged in the information? The conveyance was by railroad cars — and that that is not a *foot* post according to the usual and ordinary acceptation of language is manifest

But it is urged, that it is within the mischief designed to be suppressed; and that there can be no doubt that the legislature intended to prohibit the setting up of any and all posts by individuals — and that this must be deemed to come within the description, and may more properly be called a foot than a horse post. It was also urged, in relation to the 24th section, that although there might be some difficulty in the particular phraseology used, yet that the general purpose and object of the statute is plain, and should be carried into effect. Here lies the stress and difficulty of the case. Since the passing of the post office laws new modes of conveyance have been established, and a condition of things arisen not then known or contemplated. And the question is, whether new acts in contravention of the general spirit and policy of the laws, can be brought within any of its prohibitions, and subjected to a specific penalty.

However willing the court might be to attain that end, it cannot strain or force the language used beyond its fair and usual meaning. We are not authorized, upon our notion of the general policy and purpose of the statute to inflict penalties, which the terms thereof according to their ordinary acceptation do not create. We cannot doubt that the mischief of regularly conveying letters by railroad is quite as great as carrying them by a man on foot or by horses. But is the court therefore authorized to say, that a person travelling in a railroad car is a man travelling on foot, or that a train of railroad cars moved by a steam engine may constitute a foot post?

There are several cases which have been decided in the courts of the United States, in which it would seem that the terms used in revenue and other acts, might more easily have been brought to create liabilities and forfeitures, in furtherance of the evident purposes and policy of the statute, than in the present case — and yet the court declined giving them such extended construction. Sugar dissolved in water was held not to be "sugar" so as to be subject to duties as such. *United States* v. 112 *Casks Sugar*, (8 Peters, 277.) Loaf sugar which had been "crushed" and then imported, held not to be loaf sugar under the statute imposing a duty on that article. *United States* v. *Breed*, (1 Sum. 150.) *Worsted* shawls

with cotton borders, or *worsted* suspenders with cotton straps—held not to be manufactures of *wool*, or of which wool is a *component* part, although worsted is made of wool. *Elliot* v. *Sturtevant*, (10 Peters, 150.) This also was under a revenue act. Driving living fat oxen across the lines to the enemy in time of war held not to be a *transportation* of them. *United States* v. *Shelton*, (2 Wheat. 120.) In this case the court say, "that the mischief is the same affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law."

In *United States* v. *Breed*, (1 Sum. 166, 7,) it is said, that it defeats the general policy of the act is no ground for constraining construction. So also that "a wide door will be opened for the admission of frauds" upon the revenue is no reason for different practical constructions of the acts of congress. *United States* v. 200 *Chests of Tea*, (9 Wheaton, 443, 4.) A whaling voyage held not to be a foreign voyage, so as to require bond to be given to bring home the crew, although admitted to be within the mischief to be prevented and the policy to be promoted. *Taber* v. *United States*, (1 Story, 1, 6, 10,); and it is there said: "The language (of a statute) is not to be employed to cover a case standing upon similar grounds, if the ordinary interpretation of the terms would not reach it."

Again in *Adams* v. *Bancroft*, (3 Sum. 389,) the court say:—"Laws are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burden on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute."

I shall instruct the jury, 1. That if a passenger in a railroad car or steamboat, passing over a post road or route, carry a letter without the knowledge or consent of the owner of the car or steamboat, or any of his agents or servants, such owner is not liable to the penalty provided by the 19th section of the act of 1825, ch. 275. 2. That such knowledge or assent are not to be presumed from the facts admitted in this case. 3. That the person who sends such letter by such passenger is not liable to the penalty provided by the 24th section of said act, unless the owner of the car or steamboat is liable to the penalty provided by the 19th section of said act. 4. That the setting up of a post by railroad car or steamboat is not setting up a foot post, within the meaning of the 3d section of the statute of 1827, ch. 218.

Verdict for the defendant.

Supreme Judicial Court, Massachusetts, March Term, 1844, at Boston.

COMMONWEALTH *v.* BENJAMIN F. RICKETSON.

By the 32d chapter of the revised statutes, every Boston pilot, who offers his services to the master of an inward bound vessel, before she has passed the line designated in § 24 of that chapter, is entitled to full fees of pilotage, whether his services are accepted or not.

Any master of a vessel may, in all cases, pilot his own vessel into Boston harbor, liable only to the payment of pilotage fees when a Boston pilot seasonably offers his services: But if no Boston pilot seasonably offer his services, the master may employ any other person to pilot his vessel in, and such person may do so, without incurring any penalty.

When a Boston pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master of the vessel does not accept the services, but employs a person who is not authorized as a pilot for said harbor, to pilot his vessel in, the master thereby incurs no penalty; but such person, by undertaking to pilot the vessel in, incurs the penalty imposed by the Revised Statutes, c. 32, § 23.

The payment of pilotage fees by a master of a vessel, who has declined an authorized pilot's seasonable offer of service and employed an unauthorized person to pilot the vessel in, is not the payment of a penalty, and is no bar to an indictment against such person for undertaking to pilot such vessel in.

The pilots, who are authorized to pilot vessels through the Vineyard Sound, over Nantucket Shoals, have no authority, by the Revised Statutes, c. 32, § 42, to pilot the same vessels into Boston harbor: And when one of them undertakes to pilot one of such vessels into that harbor, at the request of the master thereof, and is indicted for so doing, his warrant, as such pilot, is not admissible in evidence, in his defence, even for the purpose of showing that he was lawfully on board such vessel.

Under the Revised Statutes, c. 32, § 24, it is a sufficient offer of a pilot's services, in the night, to the master of a vessel bound into Boston harbor, if the pilot approaches such vessel and hails her, and makes all the tender which the time and circumstances permit, and his hail is heard on board, though it is not answered: It is not necessary, in such case, that there should be an actual offer to the master, and that he should have actual knowledge of such offer.

When an authorized pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master, without requiring the pilot to show his warrant, declines to accept his services, and employs an unauthorized person to pilot his vessel in, and such person is indicted for undertaking to pilot her in, he cannot defend on the ground that there is no proof that the pilot had his warrant with him when he offered his services.

Depositions in perpetual remembrance, taken before an indictment is found, are not admissible on the trial of the indictment.

When a jury, after a cause is committed to them and they have gone out, return and make an inquiry of the court, as to a fact, it is within the discretionary power of the court to admit testimony respecting the matter of such inquiry.

Austin, attorney general, for the commonwealth.
O'Brien and *Wellington* for the defendant.

Supreme Court of Pennsylvania, September Term, 1843.

THE MONONGAHELA NAVIGATION COMPANY *v.* COONS.

The license allowed by the statute of 1803, to the owners of lands adjoining navigable streams, declared by law to be highways, to erect dams on them for mills or other water-works, provided they do not injure the navigation, or prevent the fish from passing; is not indefeasible, but subordinate to the state's eminent domain.

The legislature may constitutionally incorporate a company to make a lock and slack water navigation, without requiring it to make compensation for consequential damage to private property in the execution of the work. *Held*, therefore, that the Monongahela Navigation Company incorporated to make such a navigation from Pittsburg to the line between Pennsylvania and Virginia, by dams and locks in the Monongahela river, was not liable in an action on the case for obstructing the water on the Yougheogany river by a dam in the Monongahela, to the injury of the plaintiff's mill.

Williams and *Williamson* for the plaintiff in error.
Miller for the defendant.

Court of Common Pleas, Cincinnati, January Term, 1840.

THE STATE OF OHIO *v.* ROWLAND H. NOBLE.

On an indictment for murder in the second degree there may be a conviction of manslaughter.

The fact of killing being proved, the presumption of law in Ohio is murder in the second degree.

If in a sudden quarrel, the party who forced it upon the other be unintentionally killed, the slayer stands excused; for as to him the quarrel is not an unlawful one.

The English doctrine, that a party assailed must flee as far as he can, before resisting, is not law in this country.

If there be actual danger or reasonable probability of great bodily harm, though no danger to life, the party assailed is not required to retreat, but may justifiably kill the assailant, in self-defence. [Western Law Journal, i. 23.]

Rush Circuit Court, Fall Term, 1843.

THE STATE OF INDIANA *v.* ELIZA HUBBARD.

Where a daughter takes the life of her father, as a necessary means of preventing him from killing her mother, it is justifiable homicide.

Where insanity is relied upon as a defence to the charge of murder, the evidence must satisfy the jury that the prisoner, at the time of killing, knew not that it was in violation of the laws of God and man. [Ibid. 210; Law Rep., vi. 431.]

Digest of English Cases.

Selections from 5 Scott's New Reports, parts 4 and 5; 6 Scott's New Reports, part 1; 11 Meeson and Welsby, part 3; 2 Dowling's Practice Cases, New Series, part 5, and vol. 3, part 1; 3 Gale and Davison, part 1; 4 Manning and Granger, parts 1, 2 and 3; 2 Queen's Bench Reports, part 4.

ACTION ON THE CASE.

(*For collision, damages in.*) A vessel insured by a time policy started from Calcutta for England; while proceeding down the river Hooghly she sustained some damage by an accidental collision with a steam vessel, and after a few days was found to leak so much as to render it necessary to return. She underwent some repairs and *was re-coppered*, and again set sail for England; but she was again compelled to return, and was put into dock, her wales, &c. removed for the purpose of examining the state of her timbers, and was ultimately found so defective as to render it inexpedient to repair her, and consequently she was sold as she lay, for the purpose of being broken up. The plaintiff claimed for an average and also for a total loss. The jury negatived the latter, and as to the former, returned the following verdict: — "Verdict for the plaintiff on the first issue, sufficient not having been paid into court to cover the expense of stripping off and replacing the copper, for all the repairs; and charges on both occasions of the return of the vessel to Calcutta actually incurred; and also what would have been necessary for replacing the wales, which we consider was the consequence of the collision." Held, that the plaintiff was not entitled to recover anything in respect of the replacing the wales, that expense not having been actually incurred. — *Stewart* v. *Steele*, 5 Scott, N. R. 927.

ARBITRATION.

(*Award, when final.*) In an action of assumpsit, the defendant pleaded non-assumpsit, payment, and a set-off; and issues having been joined thereon, the cause and all matters in difference were, by a judge's order, referred to arbitration, the costs of the cause to abide the event, and the costs of the reference and award to be at the discretion of the arbitrator. The arbitrator awarded "that the plaintiff should pay to the defendant the sum of 16*l.* 10*s.* 2*d.*, being the balance which I find to be due from the plaintiff to the defendant;" and he further awarded that each party should pay his own costs of the reference, and a moiety of the costs of the award: Held, that the award was bad, on the ground of uncertainty as to the finding of the issues, and there being no adjudication at all upon the cause. (10 M. & W. 550.) — *Pearson* v. *Archbold*, 11 M. & W. 477; 2 D. P. C. (N. S.) 1018.

2. (*Award, when final — Wrong award of damages — Costs.*) To an action on the case for injuring certain easements, and also a wall belonging to a house in which the plaintiff claimed a reversionary interest, the defendant pleaded not guilty, and several special pleas, denying the plaintiff's reversion, his title to the rights claimed by him, and the injury to the wall. The cause was referred, the costs of the cause to abide the event of the award. The arbitrator found for the defendant on

the plea of not guilty, and also on the plea denying injury to the wall, and for the plaintiff on the other issues, and assessed nominal damages thereon: Held, that this assessment of damages might be treated as surplusage, and the defendant was nevertheless entitled to the general costs of the cause. (1 Brod. & B. 465.) — *Ross* v. *Clifton*, 2 D. P. C. (N. S.) 983.

AUCTION.

(*Construction of conditions of sale.*) A sale by auction of mercery goods took place under, amongst others, the following conditions: — A deposit of 5*s.* in the pound to be paid down for each lot, the lots to be taken away with all faults, imperfections, or errors of description, at the purchaser's expense, on, &c., and the remainder of the purchase money to be paid *before the delivery*. Besides these conditions, the catalogue contained the following: — "Mr. P. begs to announce that the stock comprised in this catalogue has been measured to the yards end, and will be delivered with all faults and errors of description. All the small remnants must be cleared at the measure stated in the catalogue." The catalogue professed to give the measure of each lot. The goods were on view for two days prior to the sale, and the bidding was at so much per yard: Held, that under these conditions and memorandum, a right in the purchaser to examine and measure the lots before payment of the purchase money was not by law implied. — *Pallitt* v. *Mitchell*, 5 Scott, N. R. 721.

BANKRUPTCY.

(*Fraudulent preference.*) In an action by assignees of a bankrupt to recover back money alleged to have been paid by the bankrupt to the defendant, by way of fraudulent preference in contemplation of bankruptcy, the judge, assuming there had been such a degree of importunity on the part of the creditor as would under ordinary circumstances repel the presumption of the payment being voluntary, left it to the jury to say whether it was made in consequence of that importunity, or with a view of fraudulent preference of the defendant: Held, that this was a proper direction. — *Cook* v. *Pitchard*, 6 Scott, N. R. 34.

BILLS AND NOTES.

(*Notice of dishonor.*) The following notice of dishonor held sufficient: "Your draft upon C. is *returned to us unpaid*, and if not taken up in the course of this day, proceedings will be taken against both you and him for the recovery thereof." (6 Ad. & E. 499; 2 M. & W. 799; 2 Q. B. 388.) — *Robson* v. *Curlewis*, 3 G. & D. 69.

2. (*Notice of dishonor.*) B., the plaintiff's agent at Sunderland, having occasion to remit money to the plaintiff, paid the amount into the defendant's bank at Sunderland, and received a bill of exchange indorsed by the defendant, which he, B., indorsed and transmitted to the plaintiff. The bill fell due on Saturday, October 31st, and was dishonored. On that day the plaintiff wrote to B. a letter, which B. received on the Monday, containing the following: — "I have also to apprize you, that the draft for 33*l.* 14*s.*, due the 1st of November [Sunday], has been duly presented this day and returned dishonored; probably it may be up on Monday; it is drawn on P. and Co.; it will be proper to advise the drawers, in case the acceptors do not remit." On the Wednesday following, B. gave notice to the defendant of the dishonor: Held, too late.

The holder of a bill of exchange need not inform a party, to whom he gives notice of its dishonor, that he looks to him for payment. — *Miers* v. *Brown*, 11 M. & W. 372.

3. (*Promissory note payable by instalments, within 3 & 4 Ann. c. 9.*) A promissory note payable by instalments is assignable within the stat. 3 & 4 Ann. c. 9; and the maker is entitled to the days of grace upon the falling due of each instalment. *Oridge* v. *Sherborne*, 11 M. & W. 374.

4. (*Parol acceptance.*) A promise to accept a bill not yet drawn does not amount to an acceptance of it; although the bill be discounted for the drawer on the faith of such promise. (3 Burr. 1663; 1 East, 98; Holt, N. P. C. 181; 4 Campb. 393.) — *Bank of Ireland* v. *Archer*, 11 M. & W. 383.

5 (*Alteration of — Pleading.*) In an action by the payee against the maker of a joint and several promissory note, the defendant is not entitled, under the plea that he did not make the note, to set up as a defence that he signed the

note as surety, on the faith that other persons would also sign it as sureties, and that the name of one of them who had so signed was cut off from the note. (2 C. M. & R. 291; 4 M. & W. 417; 9 Ad. & E. 926.)

Semble, that the note was vitiated by cutting off the signature of one of the joint and several makers from it. — *Mason* v. *Bradley*, 11 M. & W. 590.

6. (*Presentment of bank note.*) In an action of debt for money had and received, it appeared, that on Saturday evening the plaintiff gave charge of a 5*l.* bank note of Messrs. P. and Co.'s bank, to the defendant at his request; on Monday morning the banking-house of Messrs. P. and Co. was opened for two hours, and then closed, and the partners afterwards became bankrupts; no payments were made, and the jury gave an opinion that if the note had been presented, it would not have been paid. The note was not in fact presented, but on Monday the plaintiff sent it to the defendant and requested to have his money returned; the defendant at first promised to return it, but afterwards refused: Held, that the obligation on the holder of the note in such a case is to give prompt notice to the person from whom he received it of the stoppage of the bank, and to tender the note back to him, and that in the particular case the plaintiff had done all that he was bound to do, and was entitled to recover, although there had been no presentment of the note. — *Turner* v. *Stones*, 3 D. P. C. 122.

DEBTOR AND CREDITOR.

(*Composition deed — Liability of preferred creditor.*) Where the defendant, being a creditor of the plaintiff, entered into a composition deed, with the other creditors, to receive 10*s.* in the pound, under an agreement with the plaintiff that he would give the defendant his promissory note for the remainder of his debt, which the defendant should keep in his own hands; and the note was accordingly given, and the composition paid to the defendant; and he negotiated the promissory note, the holder of which enforced payment from the plaintiff: Held, that the plaintiff might recover back from the defendant the sum so paid by him, in an action for money paid. (6 M. & Slew. 160.) — *Horton* v. *Riley*, 11 M. & W. 492.

DEED.

(*Alteration in, when vitiated by.*) A power of attorney was executed abroad, appointing B. the attorney. It was delivered to Henry B., who, according to the evidence, was the party meant to be authorized by it; and he filled up the blank with his Christian name, "Henry;" Held, that the power was not invalidated thereby. — *Eagleton* v. *Gutteridge*, 11 M. & W. 465; 2 D. P. C. (N. S.) 1053.

EVIDENCE.

(*Secondary evidence — Search for attesting witness.*) In an action on an attested agreement, it was proved that the attesting witness, some months ago, had been seen to embark on board a vessel bound for America: that a letter had since been received from him, and marked by him "ship-letter;" and that he had not since been seen at a lodge of Odd Fellows to which he belonged: Held, sufficient to let in secondary evidence. — *Davidson* v. *Carr*, 2 D. P. C. (N. S.) 1034.

FRAUDS, STATUTE OF.

(*Memorandum within s.* 17.) An order for goods, "on moderate terms," is a sufficient memorandum within the 17th section of the Statute of Frauds. (5 B. & C. 583; 10 Bing. 482.) — *Ashcroft* v. *Morrin*, 4 Man. & G. 450.

FRAUDULENT REPRESENTATION.

(*Action for, when maintainable.*) If a party makes an untrue representation to another for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, an action on the case for deceit lies, and it is not necessary to show also that the defendant *knew* the representation to be untrue. — *Taylor* v. *Ashton*, 11 M. & W. 401.

LIMITATIONS, STATUTE OF.

(*Part payment.*) Part payment *after* action brought will not take a debt out of the Statute of Limitations. (2 Burr. 1099; 3 B. & Ald. 511; 6 B. & C. 603.) — *Bateman* v. *Pindar*, 2 G. & D. 790.

2. (*Part payment by partner.*) A payment made by one partner after the dissolution of the partnership on account of a partnership debt, and after six years have elapsed without any acknow-

ledgment of the debt, is sufficient to take the case out of the operation of the Statute of Limitations as against the other partner, though the jury find that the payment was fraudulently made against his consent, and in concert with the creditor to revive the debt. — *Goddard* v. *Ingram*, 3 G. & D. 46.

3. (*Parol admission of part payment.*) In an action by the payee against the maker of a promissory note, to rebut a plea of the Statute of Limitations, the plaintiff proved the fact of a payment on account of the note within six years, and he further proved a parol admission by the party paying that he made this payment.

Held, that this admission was rightly received in evidence to corroborate the direct proof of the fact of payment, as the stat. 9 Geo. 4 merely excludes an acknowledgment "by words *only*." (2 C. M. & R. 723; 3 Bing. N. C. 397.) *Bevan* v. *Gething*, 3 G. & D. 59.

4. Where A. has an account against B., some of the items of which are more than six years old, and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in A.'s favor, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance; and takes the case out of the operation of the Statute of Limitations. — *Ashby* v. *James*, 11 M. & W. 542.

PRINCIPAL AND AGENT.

(*Liability of agent to principal.*) A declaration stated that the defendant had been retained by the plaintiffs as their broker, to sell certain goods and deliver the same, according to the terms of the contract, to such person as should become purchaser. It then alleged that the defendant sold the goods of one P., and P. purchased at certain times of delivery, the amount to be paid on delivery: Held, that this amounted to an express contract by the defendant with the plaintiffs to deliver what he sold for ready money only.

That the duty of the broker arose from his contract not to deliver but for ready money.

And that case was maintainable against the defendant for delivering without the price being paid. — *Boorman* v. *Brown*, 2 G. & D. 723.

STOPPAGE IN TRANSITU.

One W., the occupier of a mill called Mickley Mill, near Ripon, had been in the habit of purchasing goods from the plaintiff, who sent them by a carrier to Boroughbridge under a bill of lading, by which they were made deliverable "at Boroughbridge, to Mr. W., Mickley Mill, near Ripon." The goods were usually fetched from Boroughbridge by the waggons of W.

On the 18th August, 1841, the plaintiff received from W. an order for 100 bales of flax, "*to be sent to Boroughbridge as usual.*" The flax was shipped on the 21st on board a vessel which went to York, where it was unloaded and put on board fly boats (bound for Ripon) and conveyed to Boroughbridge, and there deposited at a warehouse belonging to the Ouse Navigation Company, *where it ceased to be under the control of the carrier.* The flax arrived at Boroughbridge on the 4th September. W. stopped payment on the 6th. On the 9th the flax was stopped on behalf of plaintiff; and on the 10th it was taken under an execution at the suit of third persons: Held, that the transitus was at an end when the flax was deposited in the warehouse at Boroughbridge, the warehouse keepers being for this purpose the agents of the consignees, and consequently the plaintiff's right to stop in transitu was gone. (10 M. & W. 436.) — *Dodson* v. *Wentworth*, 5 Scott, N. R. 821.

SUNDAY.

(*Contract made on.*) A plea that the contract declared upon, being a contract which under the Statute of Frauds required the defendant's signature, was entered into with the plaintiff on a Sunday in the way of the plaintiff's ordinary business, is not supported by evidence that the contract was signed and delivered by the defendant to C. on a Sunday, and delivered by C. to the plaintiff on a subsequent day.

A guarantee given by B. a tradesman to A. another tradesman for the faithful services of C. a traveller, to be employed by A., is not an act done in the way of the ordinary business of B. within the meaning of 29 Car. 2, c. 7. — *Norton* v. *Powell*, 4 M. & G. 42.

TRESPASS.

(*What is a taking of goods.*) Defendant, claiming rent in arrear from the plaintiff, his lodger, locked the door of the room in which the plaintiff's goods were deposited, and refused to allow the plaintiff to enter and remove them, saying that he should not have them until he had paid his rent: Held, that the acts of the defendant did not amount to a taking, and that trespass was not maintainable. — *Hartley* v. *Moxham*, 3 G. & D. 1.

2. (*What is a trespass to the person — Pleading.*) In trespass for driving a cart over plaintiff, the defendant endeavored to show, under the plea of "not guilty," that the plaintiff slipped off the edge of the pavement just before the defendant's horse and cart, and that the injury occurred without any negligence of the defendant.

Held, that this admitted the trespass to have been the act of the defendant, and set up matter of excuse, and that it should therefore have been specially pleaded. (2 Salk. 637; 2 Camph. 378, 500.) — *Hall* v. *Fearnley*, 3 G. & D. 10.

TROVER.

(*What demand and refusal is a conversion.*) Trover for a chattel cannot be maintained upon a demand and refusal to re-deliver the chattel in the same good plight and condition in which it was when it came into the possession of the defendant, for the refusal to re-deliver in compliance with such a demand is merely a refusal to re-deliver the chattel in its former plight, and not a refusal to deliver absolutely. — *Rushworth* v. *Taylor*, 3 G. & D. 3.

2. (*For bill of exchange — Conversion.*) Plaintiff, being indebted to defendant, gave him a bill of exchange for 170*l.* "for discounting or return on demand." Defendant transmitted the bill to a broker in London, with directions, if he was satisfied with the acceptor's respectability, to put the bill to his (defendant's) account. In trover for the bill, defendant pleaded not guilty, and not possessed. It was proved at the trial that the defendant had authority to apply the proceeds of the bill to his own use, but that if he could not get it discounted, he might return it to the plaintiff. The judge directed the jury to decide whether the defendant had wrongfully converted the proceeds of the bill to his own use. The plaintiff objected to this direction, and elected to be nonsuited: Held, that the direction was not inconsistent with the state of the record, for that it was within the issue to inquire whether the defendant had acted within the scope of the authority given to him by the plaintiff.

Held also, that under such circumstances, the plaintiff having elected to be nonsuited, the court would not direct a new trial. — *Wilkinson* v. *Whalley*, 3 D. P. C. (N. S.) 9.

VENDOR AND PURCHASER.

(*Action by purchaser to recover back deposit.*) To entitle the purchaser to maintain an action for money had and received to recover back a deposit paid on a contract for the sale of goods, there must either be an agreement to rescind, or circumstances upon which a special action for breach of the contract would lie. — *Filt* v. *Cassanet*, 5 Scott, N. R. 902.

WILL.

(*Attestation of.*) A person who could neither read nor write, being called upon to attest a will, had his hand guided, and so subscribed his name to the will. Held, that the will was properly subscribed within 7 Will. 4 & 1 Vict. c. 26. — *Harrison* v. *Elvin*, 2 G. & D. 769.

WITNESS.

(*Competency.*) Held, (before 6 & 7 Vict. c. 85), that where one of two co-defendants in an action on contract has suffered judgment by default, he may, if not otherwise interested in procuring a verdict for the plaintiff, be called by him as a witness against the other defendant. — *Pope* v. *Steele*, 2 Q. B. 733.

2. (*Same.*) In an action by indorsee of a bill of exchange against acceptor, the defendant pleaded a plea showing that the indorsee sued for a previous indorser, who had broken the agreement which was the consideration for the drawing and accepting: Held, (before the stat. 6 & 7 Vict. c. 85), that the drawer might by rendered a competent witness for the defendant by indorsing his name on the record under the 3 & 4 Will. 4, c. 42, s. 26. — *Kilpack* v. *Major*, 2 Q. B. 737.

Notices of New Books.

REPORTS OF CASES DETERMINED IN THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE. By JOHN SHEPLEY, Counsellor at Law. Volume VIII. Maine Reports, Volume XXI. Hallowell: Glazier, Masters and Smith. 1843.[1]

THE appearance of a new volume of Reports, in these days, is surely no rarity. Being domiciled in a nation, within whose borders are more than forty judicial tribunals, each of which sends forth, at least, its annual contribution to build up the stupendous pyramid of common law jurisprudence, it would hardly be expected, that we should look forward to the forthcoming of such a volume with any great impatience, or greet it, when actually brought forth, with any tokens of peculiar joy. A new novel or poem, arrived, or expected, may cause the youthful eyes of both sexes, not unnaturally, to sparkle with the impatience of hope and curiosity; — but the members of the profession, better trained by patient endurance of labor and self-denial, wait with more calmness for the joys to come, upon the appearance of a new work in their peculiar province; sometimes, perhaps, "counting the cost." Indeed, to speak plainly, inasmuch as every new law book is, to the extent of its price, a direct tax, a sort of *black mail*, exacted, *nolens volens*, from a profession, few in number, and whose labor is more scantily remunerated than that of any other class in the community; — it is not strange, that the members of that profession should give but a cold welcome to such necessary evils; — in other words, that they should say, as has sometimes been said, not only by the bar, but by the bench, that the illimitable spawning of law books, which has increased with locomotive velocity within the last thirty years, is becoming, if it has not already become, an intolerable burden. The royal builder of the temple and maker of proverbs, when he said, "of making many books there is no end," established an indefeasible title to be called the "wisest man;" — especially, when we consider that he arrived at this conclusion, although the long line of judges, who ruled in Israel for the space of four hundred years before his dynasty ascended the throne, had published no *Reports*, — except, indeed, their chief and leader, and he only the single book of Deuteronomy.

Notwithstanding, however, this adverse predisposition towards new law

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[1] NOTE BY THE EDITOR. A notice of this volume appeared in the Law Reporter for March. It was written by one of our contributors, who has also favored us, in the present number, with a criticism on the last volume of the New Hampshire Reports. It is not our custom to publish more than one notice of a new book, because the space which we can devote to this department of our journal is necessarily small. But having received a communication from one of our oldest contributors — a gentleman who, in a successful practice of more than twenty years, has earned a right to be heard upon any occasion, and at any tribunal where the law is discussed — we gladly yield him a place in the present number. It will be seen that our contributors differ widely as to the last volume of Maine Reports, but as neither of them ever lived in that state, they cannot be influenced by personal predilections or prejudices; and, while two such able combatants are in the field, the editor, whose personal feelings in this matter are all one way, may well stand apart — exclaiming with king Henry on the battle field: —

Here on this mole-hill will I sit me down,
To whom God will, there be the victory!

books in general, we have never seen a new volume of Reports from our sister state of Maine, but with real satisfaction. When we consider, that she is "bone of our bone, and flesh of our flesh," — that for a long series of years she was governed by the same constitution and laws; and that when separated, she modelled her own closely by those of her mother state, — that her political forms and institutions are more exactly like ours, than are those of any other state of the Union, — it is manifest, that if her laws are administered by an able judiciary, we might well expect to derive far more benefit from her Reports, than from those of any other state. Our reasonable expectations, in this particular, have not been disappointed. At the time of the separation of Maine from Massachusetts, the political party having the ascendency in the new state was of a different denomination from that, which had predominated in the commonwealth before the division. It was feared, that the party who thus found themselves in power in the new state, "feeling might and forgetting right," would look to their own ranks, only, for professional men to fill the high judicial stations under their new government. All such fears turned out to be groundless. With a wise view to the public good, and with a magnanimity, certainly not always brought into action in such cases, they placed at the head of their highest judicial tribunal, the man, who, by universal consent, was considered and pronounced to be the fittest person to fill that high office; — but he was of the political party, not then predominant. And from that time to the present, in all the mutations of party, their supreme bench has been filled with a succession of men of high character for learning and integrity; — in truth we affirm, with some knowledge of the individuals of whom we speak, that if that tribunal has been second to any in New England, it has been so only to the highest in the state from which they had separated. When the recent extensive changes were about to take place in their judiciary, about three years since, much apprehension was entertained, lest party predilections and antipathies should exercise an evil influence; but it must be admitted, and it was so admitted as soon as the result was known, that the appointments then made, were, upon a careful survey of the subject in all its bearings, the very best and most judicious, that could have been made, if no such thing as political parties had ever existed. At that time, the retirement of the then chief justice of the supreme court, gave an opportunity to fill that important place, by translating to it from the common pleas, one, who, as chief of the latter, by his great learning and peculiarly happy judicial gifts, had acquired a reputation not surpassed, by any living judge. This opportunity was not overlooked nor neglected, and the present chief justice of the supreme court of Maine, has sustained and justified, in his present station, now that he is seen on paper, and can be judged of by his written opinions, the high character which he had acquired, as presiding judge at Nisi Prius. We would, that one of our own judicial functionaries, who has, in a similar situation, earned a like reputation, might, by a similar *translation*, be called to the exercise of his high gifts in a tribunal of more extended jurisdiction.

The volume, whose title is at the head of these remarks, is the first, which has been wholly the result of the labors of the court, under its present organization. It is creditable to their learning and diligence. A full sized volume of five hundred and seventy-two pages, presents us one hundred and eight cases, all of which were argued before the court in the brief space of three months. There is much to be commended in the form, in which the cases are given to us. The facts in each case are briefly stated by the reporter, and the points taken by counsel upon each side, with the cases cited by each in support of his points. Then follows the opinion of the court, which appears, in every instance, to have been handed in writing to the reporter by the member of the court, to whom the drawing up of this opinion was assigned in the respective cases, — there being, so far as we recollect, no *per curiam* decisions, for which nobody is responsible. Wherever the case required it, the several points taken by

counsel, are fully considered, and well reasoned, by the court, with a comparison of the authorities upon each side. There is no *judicial dodging*, to get rid of a point, which could not be *conveniently* disposed of in any other way. There is none of that *ambitious talking*, (that judicial leprosy, which when once seated in the system, can never be cured,) and which impels the judge, instead of an opinion, to give a *dissertation* upon that entire branch of the law, within which the case in hand is supposed to fall. There is a good degree of learning, also, manifested by counsel, — as appears by the distinctions taken by them, and the ample range of authorities, by which they sustain them. There is, too, throughout, a healthy and vigorous brevity, with the court and the bar, which give life and vivacity to the whole proceedings, and which are highly characteristic of the eminently practical people amongst whom this book originated. In all these respects, this volume is a model for all reporters and judicial functionaries. We are not ashamed, that it should pass from state to state, and even cross the water, as a specimen of American juridical learning and industry.

Thus far, taking the *book*, whose title we have transcribed, as our only *witness*, and looking at the court from "*without*," we have ventured to go; — and we should have felt quite safe in doing so, had we not, before our eyes, a "*notice*" of this same volume, contained in a late number of the Law Reporter, (the number for March, 1844,) in which the writer expresses a very different opinion, and comes to quite a different conclusion. He begins his remarks, by complaining, that "two reporters of unquestionable learning and ability have been compelled to yield the post which they adorned," by reason of "political opinions," — that "Mr. Greenleaf was pushed from his stool by Mr. Fairfield; and Mr. Appleton, whose various attainments and singular fondness for jurisprudence cannot be mentioned without praise, was obliged to make room for Mr. Shepley." All this may be true; — and if this shuffling of people out of and into office, was a mere political scramble for the spoils, it is surely highly reprehensible. But inasmuch as we know not, personally, Mr. Shepley nor Mr. Appleton, and so no personal friend of ours has been either turned *out* or turned *in*, — we beg leave to form our judgment of the *book* before us, upon its own intrinsic merits, without regard to the manner, or the motive, of the appointment of the reporter. In this particular, we have, perhaps, somewhat the advantage of the author of the "Notice," so far as the forming of a true and correct opinion is concerned. We have no *jaundice*, in this matter. Mr. Appleton may be all, and more, than he is said to be in the "Notice;" — we know him not, except by his works; — and if we look to his two volumes of Reports, very respectable as they certainly are, we must confess our inability to discover, in what particular they excel the book before us, and some of the previous volumes reported by Mr. Shepley. We should feel unwilling to hazard the opinion, that the volumes of Mr. Appleton are, on the whole, in any respect superior. We put ourselves upon the opinion of the profession, and pray their verdict, in this matter. Besides, if we may be allowed a word by way of surrebutter, (special pleading being not forbidden by statute in courts of criticism,) we would remind the author of the "Notice," that so far as the books show, if "Mr. Appleton was obliged to make room for Mr. Shepley," Mr. Shepley had first been "obliged to make room for Mr. Appleton." It seems, that Mr. Shepley published seven volumes of Reports, before Mr. Appleton was appointed.

The "Notice" proceeds to say, "If Mr. Shepley's peculiar labors have very little to commend them, even less have those of the court." "We see them only in their judgments, ... looking at these, . . . we are obliged to express our reluctant sense of their worthlessness, as contributions to the science of jurisprudence. The discussions at the bar seem to be meagre, and for the most part, occupied by references to the local decisions merely. The opinions of the judges are, if possible, more meagre than the discussions at the bar. They are not commended by learning,

by aptness of expression, or by happy or careful expositions of the reasons on which they are founded. They are dry decisions, calculated merely to range among the precedents of the law. In the eye of jurisprudence, the recent judgments of the supreme court of Maine are little better than fish bones." "Be merciful to us, *miserable offenders.*" — These latter words, though marked in quotation, gentle reader, are not taken from the "Notice," above referred to; — they are a broken sentence borrowed from a religious service, and which we have incontinently uttered, as a sort of involuntary, ejaculatory *requiem*, which broke from us, for the benefit of the souls of the poor departed court, judges, counsellors, attorneys and reporter, of our beloved sister state of Maine, all of whom are dead and buried, as long ago as March last.

If these illustrious personages and institutions have not been actually destroyed by this *Paixhan* explosion, they are thunder-proof, and immortal besides. But taking it for certain, that they are all fairly, or unfairly disposed of, it may be a small satisfaction to surviving relatives and successors, to have some charitably disposed person take a little care of the posthumous reputation of these unfortunates, and see them decently buried; — with, perhaps, a brief epitaph, to say, such things "*have been.*"

First, then, as to the Reporter; — he is accused of having "stultified the bar," by "curtailing them of their fair proportions," as their points and arguments appear in his book. As no particular cases are specified, and with a careful examination of the whole work, and a comparison of it in this respect with the reports of our own and of other states, we cannot discover the proofs of this charge, we must be allowed to pronounce it bad, for "*uncertainty* and generality." As to this matter, if the parties thus injured, the members of the bar, do not complain, it is hardly competent for others not affected, except incidentally, to seek redress for them. As to the Reporter then, let the judgment be, "*ut sit in misericordia.*"

But then comes the accusation against the judges, as well as the bar, that all their productions, so far as they appear in these reports, are 'meagre,' jejune, 'dry,' and useless, as contributions to the science of jurisprudence. It is easy to make this charge; — but is there any justice in it, in the present case! Let us compare this volume with those produced by our own Reporter, whose abundant learning, as well as that of our bench, the writer will not call in question. We should make some allowance for the fact, that Maine is less commercial than Massachusetts, and therefore there occur in that state fewer long and complicated cases, arising out of extensive mercantile transactions. We have said, that this volume consists of five hundred and seventy-two pages, containing one hundred and eight cases. This gives an average of nearly five and a half pages to each case. The third volume of Metcalf contains five hundred and ninety-three pages, and one hundred and eighteen cases. This gives an average of five pages to each case, with a small fraction over. Thus, so far as the fulness and richness are concerned, if the quality be equal, Maine has the advantage. And if we leave the county of Suffolk, and compare Maine with our agricultural counties only, which is the only fair way, the advantage is still more on the side of Maine. It will be found, obviously, looking at our interior counties, that similar cases as reported by Mr. Shepley, are discussed and decided considerably more elaborately in Maine than in Massachusetts. And so with regard to the learning exhibited: — in Suffolk, where books are abundant and easy of access, there is usually a copious citation of authorities, — but in our country counties, where books are not so easily procured, they are not cited so numerously, as they are in Maine. If we look through a series of volumes in both states, this fact will be apparent. But how stands the matter if we compare Mr. Shepley's volume with books of reports in England. In England, three quarters of the whole of each case, generally speaking, consist of the reporter's statement of the facts, and a summary of the arguments of counsel, — the other quarter contains the opinions of the judges. This re-

sults from the manner of getting up their reports. As a general thing, the judges give their opinions *ore tenus*, and the reporter catches what he can, during the few minutes of the delivery of them. But during the arguments of counsel, three or four on each side, the reporter has ample time to get as much as he desires, and more than is useful, of their grounds and views of the case. The result is unavoidable; — in their reports, with occasional exceptions, their judges appear to great disadvantage, giving us, as represented by the reporter, very lean, unsatisfactory, and poorly reasoned, and worse expressed opinions. One of the latest decisions of chief justice Tindal, is reported in these words, "*take your rule*," the judge saying not a word more, after an argument by counsel somewhat elaborate. In all this, our system is far preferable to that so long practised in England. Here, after the decision has been agreed upon by a majority of the judges, it is assigned to one to pronounce the judgment, accompanying it with a comparison of the authorities, and a statement of the reasons which have brought them to the result. This is the grand test of judicial learning and wisdom; — these opinions, thus publicly delivered, are the overt acts by which the bench are to be tried and judged, — not by those whose causes they have decided merely, nor by the populace, — but by a learned profession, who hold them constantly in view, and make them responsible for their judgments. By our mode, the court have a very proper opportunity, carefully and advisedly, to put forth those views and arguments which have brought them to the result agreed upon; and it is this public announcement of their opinions, with a full statement of reasons, which has, in all times and places where the common law system has prevailed, secured the stability and popularity of the judiciary. With regard to our *mode* of doing this, its superiority is so obvious, that we have observed within a few years, tokens, that the Queen's Bench and Common Pleas in England, are gradually falling into it. It is now not a strange thing there, to have one judge pronounce the decision of the court, when his brethren are present, without any thing said by them; — a few years ago this almost never happened.[1]

We have now done with the eighth volume of Shepley's Reports, and with the "notice" of it published in the Law Reporter for March last. We cannot be expected to know the author of that "notice." "He speaks as one having authority," — as conscious of possessing learning and talent; — we cannot doubt that he does in fact possess them in ample measure. If what we have here said, should operate as a sort of writ of error, or of *review*, affording him a fair opportunity to *reconsider*, *amend*, and *reverse* his former *judgment*, perhaps somewhat hastily made up, — we cannot doubt it would give him pleasure, as well as ourselves, to do justice to the labors and efforts of learned and honorable men, engaged in the practical application of that system of jurisprudence, which is the subject of his admiration and study.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE OF NEW HAMPSHIRE. Volume X. Concord. Published by Asa McFarland, 1843.

BEFORE glancing at this volume, we hope to be excused for a slight reference to our remarks in a former number, on the reports of the Supreme Court of Maine. We confess our pain at being obliged to believe that we have given pain to others — particularly to persons engaged in the discharge of arduous judicial duties, of whose untiring industry, and conscientious care, consuming the hours and the minutes

[1] We would refer those, who would like to witness the vigorous and animated, yet careful manner in which the present supreme bench in Maine, discuss and decide questions of general interest, in the science of jurisprudence, to the opinions delivered by Whitman, C. J. in Goodnow *v.* Dunn; Paine *v.* Tucker; Gordon *v.* Lowell; Betts *v.* Norris; and Dinsmore *v.* Dinsmore & al.; and to the opinions of Shepley, J. in Fox *v.* Harding; Nelson *v.* Butterfield; Ramsdell *v.* Ramsdell; and to his dissentient opinions, in Paine *v.* Tucker; and Betts *v.* Norris, above cited; also, to the opinion of Tenney, J. in McKenney *v.* Whipple; as they appear in the volume at the head of this article.

with ceaseless toil and dispensing justice intelligently and cheaply to all, we have heard such warm commendations from those who are brought within the sphere of their influence. Our remarks were intended to apply to the character of the supreme court of Maine, — not as it appears to those who dwell in the golden light of the justice which they administer, the witnesses of their labors, the partakers of their confidence, the friends of their daily life ; but as it stands confessed in the last volume of their opinions ; and we confined ourselves to this volume, because it was the last published, and because it did not fall within our plan, or our inclinations, to enter into a discussion on the whole jurisprudence of Maine, since this state was taken out of the body of Massachusetts.

In publishing a volume of reports, in short, in committing any thing, however humble, to the undying existence of the printed page, the writer appears before an audience which he cannot see with the eyes of the body, separated as it is, by distances of time and space. He passes the narrow circle which surrounds the individual, and appeals to wider circles, who know him not, nor have ever listened to the friendly music of his voice. The grand inquest of the world, "without favor or affection," will judge his labors ; nor can he plead in bar of their judgment, that he is faithful *at home*, beloved by his neighbors, and trusted by his native town or state.

In noticing the recent volume of the Maine Reports, we endeavored, according to our duty, to express a frank estimate of their character, as *a contribution* to *jurisprudence*. Does the reader call to mind the volumes of reports which came to us each year from Westminster Hall,

"Like locusts warping on the eastern wind,"

and the more numerous body, the annual spawn of the numerous judicatures of the United States? Amid the darkness of such clouds, his wish will be for light ; — *Give me to see*, he will say, that my time may not be consumed by superfluous studies, that I may not encumber my shelves with supernumerary volumes of the law. The pages of a journal of jurisprudence are not occupied by any matters more proper to it than criticisms expressed with candor and freedom.

If it be true, as we have too much reason to believe, that our humble criticism has "fluttered" any members of the bar in Maine, we can only express a fear that they would deny to us the privilege which many among them have exercised, of speaking freely of the *juridical* character of their bench. Their conduct recalls the story of Dr. Johnson and Garrick. The learned lexicographer often indulged in no unmeasured language with regard to the great tragedian, but most rigidly called others to account, who presumed to touch with censure so much as a hem of his garment ; saying, "I will allow nobody to *abuse* David but *myself*."

We turn now to the supreme court of New Hampshire, who are at the same time *judges* and *reporters*. The gaunt rigor of democratic economy has deprived the bench in this state of a natural adjunct. If in this way the treasury has gained, the profession, who read their volume, has not lost, for there are few volumes of reports, in which the matters within the province of the reporter are more carefully attended to. The counsel might complain that their arguments are often represented merely by the *cases cited*, reminding us of the empty shells which denote the feast that has been. It is to be supposed, however, that the courts did not consider the points of the arguments of sufficient importance to claim a place in the pages which they edited. The statements of facts are brief, and intelligible, and the abstracts, marginal they once were, are accurate exponents of the text. But, because the court perform this labor so well, and thereby save the state the petty salary which belongs to it, is no reason why another burthen should be placed on shoulders, already heavily laden with judicial duties. But the state of New Hampshire is a hard task-master. If it does not reap where it has not sown, it affords a humble pittance to the reaper. It compels its best citizens, the ornament of the whole country, the Websters, Masons, Fletchers, to seek elsewhere the countenance of a more benignant public. It is, in short, what Horace called ancient Lybia, *arida nutrix leonum*.

The opinions of the court are in

every way respectable. They are careful and elaborate. They are clear, though not vivid expositions of the topics which they illustrate. It must be confessed, that, partly from the topics, and partly from the mode of treating them, they are dull somewhat beyond the privilege of the law; and their learning does not shew the taste and tincture of the soil of a distant antiquity. It is to be observed, however, that most of the questions considered, are sufficiently elucidated by the former judgments of their own court, and of the adjoining states; nor would we suggest any vain and pedantic reference to the ancient springs of juridical science, confessing, nevertheless, the beauty of that suggestion which our early masters in law borrowed from earlier Macrobius, *Multa ignoramus, quæ non laterent, si veterum lectio esset familiaris.*

But they do not blindly follow, while they refer to the judgments of the supreme court of Massachusetts. In *Chase* v. *Blodgett*, (p. 22) they call in question the case of *Commonwealth* v. *Green*, (17 Mass. 515), an authority which has always seemed to us as contrary to principle, as to the spirit of good neighborhood. After a luminous view of the question, Mr. Chief Justice Parker concludes that a conviction in another state, of a crime which by the laws of that state disqualifies the party from being heard as a witness, and which if committed here would have operated as a disqualification, is sufficient to exclude him from testifying in New Hampshire, in the same manner as if it had been committed, and the conviction had taken place in this jurisdiction. We object to the whole system of rules, declaring the *incompetency* of witnesses; but so long as these are a part of the law of the land, it seems to us that this decision gives them no more than the just and natural effect to which they are entitled.

In *Jaffrey* v. *Cornish*, (p. 507) they depart again from the opinions of the supreme court of Massachusetts, getting nearer to principle and to the highest authorities in the law. In *Thacher* v. *Dinsmore*, (5 Mass. 299) Mr. Chief Justice Parsons declared that, "it has long been settled as law in this state, that a negotiable note, given in consideration of a simple contract debt due, is a discharge of the simple contract," a doctrine which has been recognized since in *Chapman* v. *Durrant*, (10 Mass. R. 51); *Johnson* v. *Johnson*, (11 Mass. 361); and *Wood* v. *Bodwell*, (12 Pick. 268.) Mr. Justice Gilchrist, in delivering the first opinion which he pronounced after his elevation to the bench, sustained the better doctrine of the common law, that a negotiable promissory note is not a discharge of a preëxisting debt, unless there be an express agreement to receive it in payment thereof.

Among the opinions which have specially interested us in this volume, is that of Mr. Chief Justice Parker in *Davis* v. *Lane*, (p. 156) touching the authority of an agent during the insanity of his principal, where the latter has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent without the scope of the authority he appears to possess.

Descending from *things* to *words*, we would fain inquire how the supreme court of New Hampshire could lend its sanction to the use of a barbarism, like "loaned!" See *Titts* v. *Walker*, (p. 150) also, *Brown* v. *Silsby* (p. 521.) But as this word is not without something like American usage in its favor, we beg to be spared one moment to record our condemnation of it, even though we may seem to break a fly on the wheel. *To loan* is one of that large class of expressions, which owe their origin to a certain prurient taste, in some of our countrymen, for what seem to those who employ them, elegancies of speech. The plain and direct words of the mother tongue, which were strong enough for the preaching of the Puritans, which were sweet and various enough for the melody of Shakspeare, are not sufficient for them. They require words of a higher flight. They do not think it polite to call things by their right names. An *inn* is elevated into a *hotel* or a *house;* a *shop* becomes a *store;* a cobbler's stall is a *boot and shoe manufactory;* a *shop* for the sale of provisions is a *market;* a man's *wife* is his *lady;* things are said to *eventuate* (not *to end*) in disappointment; and lastly men are said *to loan* money, not *to lend* it. A good English noun is converted into an illegitimate *verb*. This change is not justified by any necessity for a new

word — certainly not by any felicity in that adopted. The verb *to lend* expresses distinctly all that is conveyed by *to loan;* and *lender*, *lending*, and *lent*, are as significant as *loaner*, *loaning*, and *loaned*. Besides, the first word is an integral part of the language, and has always been used by the writers of acknowledged authority. Who would mar the wise words which Shakspeare puts in the mouth of Polonius, by the substitution of our American elegance!

> Neither a borrower, nor a *lender* be;
> For *loan* oft loses both itself and friend,
> And borrowing dulls the edge of husbandry.

The verb *to loan* in all its inflections is not only vicious in respect of taste, but it is superfluous We trust it will be discountenanced from the bench.[1]

In the following sentence, "he *laid* down upon the side of the bed," *Quincy* v. *Quincy*, (p. 280), the vulgarism *laid* for *lay* must be an error of the press.

It will not be unjust to his associates to distinguish Mr. Chief Justice Parker, as entitled to peculiar honor for his services on the bench. He may be justly regarded as one of the ablest judges of the country. Did we not hear that he proposed to descend from the bench, — to superintend spindles at Lowell![1] Mr. Justice Gilchrist is one of the youngest judges of the country. He received his judicial dignity at the same age, at which it was attained by Mr. Justice Buller in England, and Mr. Justice Story at home. We cannot wish him a higher juridical name, than will be achieved by a continuance of the parallel.

[1] While the pen is in our hand, the British steam-packet has arrived with an allusion to this rumor. In Mr. Godley's candid and interesting *Letters from America*, which it brought, are the following words: "The inadequacy, too, of the judges' salaries is very prejudicial to the bench; it is impossible to expect first-rate lawyers to give up their business for such paltry remuneration as is allowed in almost all the states. A gentleman belonging to the Maryland bar told me one or two curious anecdotes illustrative of this. One of the judges lately descended from the bench and accepted the situation of *clerk in his own court!* — a situation in the gift of himself and his brother justices; his own salary had been $2,500 a year; that of the clerk whom he succeeded, amounted, with fees, to $5,000. *The late chief justice of New Hampshire, whose salary was* $1,300 *a year, has also left his post to become superintendent of one of the Lowell factories.* When such is the emolument and dignity of the judicial office, it is only astonishing that it has not fallen into utter contempt, or become, as in Russia, a recognized system of bribery." Vol. ii. 163.

REPORTS OF CASES IN CHANCERY, FROM 1778, TO 1794. BY WILLIAM BROWN, ESQ.; WITH THE ANNOTATIONS OF MR. BELT AND MR. EDEN. EDITED BY J. C. PERKINS, ESQ. Vol. I. Boston: Little and Brown, 1844.

Brown's Reports embrace the period from 1778 to 1794, while the woolsack was occupied in succession by those two master minds, Lord Thurlow, and Lord Loughborough, of whom Gibbon, in his autobiography, affords an interesting picture. He alludes to Lord North "between his Attorney and Solicitor General, the two pillars of the law and state, *magis pares quam similes*," and adds, "the minister might indulge in a short slumber, whilst he was upholden on either hand, by the majestic sense of Thurlow, and the skilful eloquence of Wedderburne." "It was a proud day for the bar," says Mathias in his Pursuits of Literature, "when Lord North made Thurlow and Wedderburne Attorney and Solicitor General; for never before that day were such irresistible overbearing talents and powers displayed by the official defenders of ministers.

> ——Hos mirabantur Athenæ
> Torrentes, pleni et moderantes frœna theatri."

Perhaps these two minds did not excel in judicature so much as in the splendor of understanding displayed in the contests of debate.

Still the judgments of two Chancellors of such mark, have an historical value for the student of jurisprudence; and they will be regarded with additional interest, as illustrations of the growth and development of Chancery, already beginning at that time to hold with the common law a divided empire in Westminster Hall.

The first appearance of these Reports seems to mark an epoch in the Reports of Chancery not unlike that, which a little later was established by the *Term Reports* in the King's Bench. Thenceforward the judgments in both Courts have appeared in an unbroken succession. Brown, therefore, must be considered, as the leader of the *regular line* of Reports in Chancery.

It should be added, however, that the character of the Reporter has not passed without strictures. An able writer in the London Law Magazine, (xx. 62) speaks of "the singular inaccuracy of Mr. Brown, as a Reporter," and Lord Eldon once alluded to the "shameful way he is represented, or rather misrepresented, to have urged a case on the Court by Mr. Brown, in total ignorance of his meaning. The printed Report gave no idea even of the scope of his observations."

The cases he has reported are of great practical value, a large part of them lying at the very foundation of Chancery. Their importance is attested by the fact that Brown's Reports are oftener cited by writers of authority than any other series of Reports in Chancery. In England they have been enriched by learned and laborious annotations by two different editors, Mr. Belt, and Mr. Eden. Until the present time, however, no edition of them has appeared in the United States.

We have now before us the first volume of an American edition, which promises to surpass in interest, and practical value, any of the English editions of the work; — nor do we believe that there is any edition of any Reports that has ever been published, either in England or America, which is recommended by such useful and ample editorial labors. The notes of Mr. Belt have been retained, and those of Mr. Eden, so far as they could be made supplementary to these, have been added. Thus the separate labors of these editors are accumulated on the same page, imparting of itself, to the present edition, a higher value than belongs to either of the English editions. In England no similar amalgamation of the two series of notes could take place, as each is protected by the laws of copyright.

To these Mr. Perkins, the American editor, has joined notes, which evince the learning, the accuracy and untiring research which have already distinguished his other labors in a similar field. The cases reported, seem to be literally *shingled* over with notes, illustrations, and references, calculated either to remove doubts or ambiguities that may arise in the text, or to explain the extent to which it has been adopted in the United States, and if we may so say, *to bring the law down to the present time*. So numerous are the authorities which, in the developments of each day, overlay the principles of our jurisprudence, that an old law book is becoming not unlike an old almanac. We must have the edition of the last year, if we would not incur the danger of serious mistakes; for juridical luminaries have their obscurations, and vicissitudes, and new authorities jostle from their ancient places some of those in whose light we have been accustomed to walk. On this account the present edition has a peculiar value, independent of the copious illustrations which it affords of the text.

The notes of this edition are not like those of Mr. Sergeant Williams to Saunders, nor of Mr. Metcalf to Yelverton; nor do we think it desirable that they should be. Much as we admire the beautiful discussions, which these distinguished editors have appended to the cases, deeming that there are no essays in the common law which are so characteristic of the peculiar style of exposition, in the light of adjudged cases, which belongs to this jurisprudence, we have, nevertheless, always regarded them *out of place*. As we refer to the reports, the page seems to groan under the superincumbent mass, almost hiding the authority which we seek. Published separately, as a series of essays, they would take an important place among *legal classics*.

The notes of the present edition are not like these. They are strictly practical. They are calculated to add essentially to the value of the Reports, as a book of reference in courts, and of daily use in the profession. In what Pope calls *the dull duty of an editor*, Mr. Perkins has entitled himself to the warm thanks of all who cultivate the law. He seems to love his ungenial labor, and accumulates authorities, and illustrations of his text, with more than the ardor which the scholiasts have lavished on the Greek and Latin page. Perhaps his own sensations, in the apparently endless, and sometimes necessarily unsatisfactory nature of his researches, may be aptly expressed in the desponding words of Scaliger to Salmasius. *Illudunt nobis conjecturæ, quarum nos pudet, posteaquam in meliores codices incidimus.*

Intelligence and Miscellany.

Law without Lawyers. — The legal proceedings of the early colonists in New England, were, as would naturally be supposed, of the most simple character. The pioneers in this new world brought over with them none of the refinements of luxury, and had no time amidst the stern realities of that day, to cultivate the graces of life, or to be over scrupulous about its forms. The forest pressed down to the very shore of the ocean, and the habitations which were erected in the midst of it, had to be guarded day and night from the insidious assaults of an enemy subtle and vindictive. The means of subsistence too, were limited and precarious, and oftentimes insufficient for the wants of the people.

Among other luxuries unknown at that day, were lawyers and a nice exposition of the law. That profession could not live among a people of such simple habits. The article was not needed, it was not among the wants of a primitive state of society; and in the division of labor which then took place, which was not very refined and scientific, there was no room for this occupation. The early colonists got along in their own rude way, without the aid of professional skill or technical form. The farmer and the fisherman built their own cabins, and made their own tools, and if they were not constructed according to the rules of art, they yet furnished them shelter, enabled them to acquire the means of subsistence, and above all, cherished a noble spirit of independence, which laid the broad foundations of a great and free empire. The lawyers that at first attempted to establish themselves among this people, wholly failed of success; they were regarded with jealousy and aversion, and were obliged hastily to abandon a field, in which they hoped to reap an abundant harvest.

In case of a delinquency or a crime, the whole company took the matter in hand, and made a common concern of it. See how they disposed of the "*first offence*" committed in Plymouth colony, in March, 1621. "John Billington is convented before the whole company for the contempt of the captain's lawful command with opprobrious speeches; for which he is adjudged to have his neck and heels tied together." "But on craving pardon he is forgiven." The *second* offence committed in the same colony was, as governor Bradford informs us, "the first duel fought in New England, upon a challenge at single combat with sword and dagger, between Edward Doty and Edward Leister, servants of Mr. Hopkins. Both being wounded, the one in the hand, the other in the thigh; they are adjudged by the whole company to have their head and feet tied together, and so to lie for twenty-four hours, without meat or drink." Here was no bill of indictment, no jury, no special pleading, nor long arguments — the trial, conviction and punishment followed immediately on the offence, by order and in presence of the whole company. We dare say it was the last duel fought in the Old Colony!

In Maine the earliest footsteps in the practice of law, were equally simple. There were no lawyers there for about a hundred years after the settlement of the country commenced. The general court took at first sole jurisdiction; afterwards courts of commissioners were held in different towns, to bring justice nearer home, and a pretty rigid discipline was kept up. Drunkenness, incontinency, and absence from church, were punished generally by fine, and

furnished ample employment for the periodical gathering of the commissioners and suitors. The first courts held there, combined the twofold duty of making and executing the laws; frequently summary justice was rendered by making and applying a law after the offence was committed, by which they were enabled to suit the punishment to the crime. This was a very convenient arrangement, because, the offence having been committed, they could adapt the penalty to its nature and aggravation, and thus more exactly accomplish the work of justice.

In 1640, John Winter, a prominent inhabitant of Falmouth, was presented for keeping down the price of beaver — which was then the great article of exchange and commerce with the natives — and making too much profit upon his brandy, and powder and shot. The bill thus sets forth a portion of his offence. "We present John Winter, of Richmond's island, for that Thomas Wise, of Casco, hath declared upon his oath, that he paid to John Winter, a *noble* for a gallon of *aqua vitæ*, about two months since, and that he hath credibly heard it reported that said Winter bought of Mr. George Luxton, when he was last in Casco bay, a hogshead of aqua vitæ for seven pounds sterling, about nine months since." [1]

The following is a declaration for slander at the same court, in an action in which the above named Winter was plaintiff, and George Cleeves, the first occupant of what is now Portland, was defendant. "That about six years last past, within this province, the defendant did slander the plaintiff's wife, in reporting that his wife, who then lived in the town of Plymouth, in Old England, was the veriest drunken w—— in all that town, with divers other such like scandalous reports, as also that there were not four honest women in all that town."

At this court some forms were observed; they had a grand jury, consisting of twelve persons, several of whom were witnesses to the offences charged; they had also their register and provost marshal, who corresponded to the clerk and sheriff in our courts. Thomas Gorges, nephew of Sir F. Gorges, the proprietor, presided in the court, which was called the *general assembly*, assisted by other gentlemen of practical knowledge. All the proceedings, however, show a want of technical form and precision.

The following process in a civil suit under the year 1647, fully shows the simplicity of the practice at that day. "To his worship Henry Joslyn, Esq., with the rest of the commissioners and assistants, now assembled at Wells; captaine Francis Champernoone, plf. against Wm. Paine, of Ipswich, declareth against the said Wm. Paine for certaine monies dew for a cable or harser delivered unto his servant Wm. Quicke to the vallew of twenty pounds or thereabout." The verdict of the jury, written upon the back of the writ, is as follows; "Wee find for the plaintiffe fourteen pound starling, and six pound starling damidge, and cost of court."

Champernoon lived in Kittery, was a nephew of Gorges, the proprietor of the province, and was appointed by him in 1639, one of the commissioners for its government. We may therefore suppose that the above declaration is a fair example of the legal form of the period. But to show how near the simplicity of native common sense approaches to the simplicity of a highly cultivated and scientific age, we quote a form prescribed by the rules of the supreme court of Massachusetts, in 1836. "In a plea of the case, for that the said C. D., on the tenth day of June, being indebted to the plaintiff in five hundred dollars for money received by the said C. D. to the use of the plaintiff, promised to pay him that sum on demand." The extremes almost kiss each other.

In criminal cases, the proceedings were equally summary; and from the numerous presentments for drunkenness, incontinency, and slander, in Maine, the inference, in regard to their morals, is not the most flattering. At the court in 1636, held at Saco, four

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[1] *Aqua vitæ* was the common name for brandy, as in France it is now called *eau de vie*. A noble was about $1 45 of our money; this gave nearly five hundred per cent. profit, which shows some ground of complaint among a brandy-loving people, as ours undoubtedly were.

persons were fined five shillings each, for getting drunk, George Cleeves was fined five shillings for rash speeches, and John Bonighton, "for incontinency with Ann, his father's maid," was fined forty shillings. In 1663, we find the following entry upon the records: Francis Small is presented, for being a common liar and drunkard; the judgment of the court is, "The court find the charges against said Small *dubious*." They, however, proceed to fine him ten shillings for drunkenness, and discharge him with admonition. At the same court, a heavy measure of vengeance is inflicted upon Robert Jordan, a wealthy inhabitant of a part of Falmouth, then called Speerwink. He had been an Episcopalian clergyman, and officiated in Falmouth many years, and maintained a most sturdy opposition to Massachusetts, which was then gradually extending her jurisdiction over this distracted province, and would not tolerate Episcopacy within her borders. Five or six indictments were found against Jordan, and he had enemies enough in the province to support them. One was for saying, that Mr. John Cotton, deceased, who had been minister of the First Church in Boston, "was a liar, and died with a lie in his mouth, and that he was gone to hell with a pack of lies;" and further, he said, "that John Cotton's books were lies, and he would prove them so." Another was, for saying "that the governor of Boston was a rogue, and all the rest thereof were traitors and rebels against the king."

The prosecution of this old man, who was one of the earliest and most respectable settlers upon this coast, originated in religious dissensions. Jordan had come over as an Episcopalian clergyman, had acquired, by marriage and his own skill, a large estate, and with many of the people in the midst of whom he was placed, entertained a very decided antipathy, not only to the jurisdiction of Massachusetts, but to her religious principles. Massachusetts was not backward, in maintaining her opposition to the English hierarchy; she determined that it should not gain foothold in her territory, and she hunted it out wherever she perceived its traces. Jordan was denied the privilege of preaching, and also of administering the rite of baptism.[1] It was natural, therefore, that himself and others of his order, should oppose, with all their influence, the extension of power by their ambitious neighbor, over this colony — a power which was mere usurpation, without the shadow of right — until she acquired the title by purchase of the heirs or representatives of Gorges. The exercise of this usurped authority, was not only fatal to the influence and advancement of the chief among the early settlers, but to religious toleration — a grace which was not given to Massachusetts, in the primitive age of her government, as all dissenters from her creed and forms can amply testify.

The punishments, as well as the laws, partook of the peculiarity of the age. The following copy of record, under the year 1665, introduces us to some of the instruments designed to avenge society, or reform the morals of the people. "We present the towns of Kittery, York, the Isle of Shoals, Wells, &c., for not attending the court's order, for not making a pair of stocks, cage, and ducking stool." These instruments, one after another, have disappeared from the criminal code and public observation: the ducking stool first, then the cage, and, last of all, the stocks and the whipping post. We well remember, however, the latest apparitions of the last two mementoes of a departed age; the moss-covered *post*, which stood behind the village church, to which culprits were occasionally tied for castigation; and the *stocks*, with their neck, and arm and leg holes, staring vacantly at our wondering and childish gaze, are still freshly remembered. But the ducking stool! ah, why was that salutary discipline abandoned? Has the race of scolds and brawling women, for whose especial accommodation it was invented, passed away? Oh, no! but the age has become more refined, and more tolerant of the abuse. This machine was a chair, suspended by a crane over water, into which the offender was plunged repeatedly, until her impatience and fretfulness was mo-

[1] The christening font, which belonged to the church on Richmond's Island, in ancient Falmouth, *the first Episcopal Church in New England*, is now in possession of a descendant of the Jordan family, in Harspwell.

derated. This species of punishment was very popular, both in England and this country, in early times. It was not quite so severe, however, as that ordeal by which witchcraft was proved. The victim was thrown into the water, *per fas aut nefas;* if she floated, she was guilty of the damnable sin, and was reserved for a worse destiny; if she *sunk*, she was innocent, and proved the efficacy of the test.

One of the subjects of that antiquated remedy, the ducking stool, was an inhabitant of Falmouth, whose name occurs in the following record: "We present Julian Cloyes, wife of John Cloyes, for a talebearer from house to house, setting difference between neighbors." That race is certainly not extinct. If they do not quarrel themselves, they are still an incessant cause of quarreling in others.

One other mode of punishment peculiar to that age, may be noticed, in conclusion of what we have to say of the olden customs in the law. "Ellnor Bonythorn, being examined by Esquire Jocelyn and Major William Phillips, J. Pac. in reference to bastardy; but not finding, on examination, her owning of the reputed father of the child, do therefore order, that the said Ellnor Bonythorn, for her offence, shall either within one month from the 20th day of September, 1667, stand three Sabbath days in a white sheet, in the public meetings, or otherwise pay five pounds into the treasury of this division." We know not which most to admire, the singularity of this punishment, or the easy manner in which it was commuted. We need not say, that on this occasion the penitent sheet was not worn. Her father was a man of property, and by his licentious manners had set the example to his children. A notice of his own incontinency, and its punishment, is recorded in the former part of our article.

We have thus carried our readers back to some of the customs of a former day; from the greatest simplicity in legal forms, which amounted to almost no form at all, our ancestors passed to the opposite extreme, and the whole skill and power of the professors of the law were exhausted, in puzzling their adversaries, and the courts, and themselves, in a maze of special pleading, which darkened and marred every case of any importance.[1] Pleas in abatement, demurrers, general and special, rejoinders and surrejoinders, so entirely smothered up causes, that the merits were almost lost sight of, and many a case was driven out of court, upon the mere technicality of pleading, without one thought of the parties, or the merits of the suit. The bar became an arena, for the trial of the ingenuity of counsel, and the display of forensic subtlety. But thanks to the progress of sound principles and a diffusion of the gladsome light of jurisprudence, the profession has got off its stilts, and is now walking upon the solid ground of good sense, untrammeled justice, and enlightened jurisprudence. Free discussion, and profound research, have opened their ample resources, and the profession of the law now comes to adorn and bless the age. It has passed from the boldness of one era, and the subtlety of another, and has reached the open and broad field of free inquiry and simple truth. Let the profession be faithful to its high vocation, "do nothing against the truth, but for the truth," and in these times of recklessness, radicalism, and wild visions, it will stand a barrier against them all, the Palladium of our country's safety.

Vesey's Reports. — The Reports of Vesey, Jr. have long held a very high rank, as expositions of the law as administered in courts in equity. From their intrinsic excellence and their early date, they occupy a place in the estimation of the legal profession in England, analogous to that enjoyed by Johnson's Chancery Reports in America. In the substantial merits of a reporter, especially accuracy, Mr. Vesey surpasses all his predecessors in courts of equity, and has not been excelled by any of those who have come after him. His reports, too, are interesting, because they embrace so splendid a portion of the history of English jurisprudence, and because their pages sparkle with names that have become historic. In them are to be found recorded the vigorous logic and strong sense of lord

[1] But see the remarks on page 3, of the present number.

Thurlow, the acute analysis and graceful flow of lord Loughborough, and the vast and well-digested learning of the much-doubting lord Eldon, whose long term of service is interrupted by a few intercalary months, in which the woolsack was occupied by lord Erskine, whose splendid forensic reputation has thrown too deep a shade upon the respectable judgments which he pronounced as lord chancellor. These reports also contain the judgments of that great judicial genius, Sir William Grant, master of rolls, a man inferior to none of those whom we have mentioned, who may be called an embodied reason — *mens sine affectu* — with so clear, calm and deep a sagacity does he pierce through the most tangled web of ingenious sophistry, and shed upon every point of the case before him the light of his own penetrating understanding. No books of the law are more consulted by practitioners than the Reports of Vesey. In them, many of the more important points of the law and practice of courts of equity were first settled, and to them, as to the fountains and full sources, the student must have recourse in questions of difficulty. The lapse of time has not made them obsolete or impaired their essential value, but only induced the necessity of an editor to show how far the principles contained in them have been modified, enforced and applied by subsequent decisions. This service, in the last London edition, was performed by Mr. Beames, a learned equity lawyer, entirely qualified for the honorable task which he undertook, whose annotations have added essentially to the value of the original text. Mr. Hovenden has also added two separate volumes of annotations, which form a distinct work, though they are merely an appendix to Vesey.

Messrs. Little and Brown propose to republish these valuable Reports, from the last London edition, prepared by the author, assisted by Mr. Beames, and to incorporate into the body of the work the valuable annotations of Mr. Hovenden; an appropriation of them which the law of copyright in England would prevent. They have also secured the valuable editorial services of Charles Sumner, Esq,, whose distinguished professional reputation is a sufficient assurance that the department of the work entrusted to his hands — the addition of the American cases and the recent English decisions — will be performed in a manner worthy of the high character of the original work.

The task of editing volumes of reported cases, affords great range to the industry and ability of the editor. The reports of Saunders, as edited by that admirable lawyer Sergeant Williams, perhaps the greatest name in English law, not crowned with the honors of the bench or the woolsack, unless that of Hargrave may dispute the palm, are favorable specimens of one extreme, in which the cases reported in the text are merely used as pegs, on which to hang a series of searching, comprehensive, and elaborate treatises, upon the legal points opened or settled in the arguments and opinions, and which are notes merely in name. Of this class, also, is Mr. Metcalf's excellent edition of Yelverton, a work never to be mentioned without praise of the neat, learned, and discriminating annotations of the editor. In opening reports of this kind, the eye traces a rivulet of text meandering through a meadow of margin; and the reader is reminded of the expression of the Roman satirist, applied to the redundant costume of the ladies of his time, *pars ipsa minima puella sui*. The other extreme is occupied by those reports, in which the notes contain simply a list of subsequently decided cases, with here and there a brief and timid observation, put forth with about as much decision as a dentist displays, in pulling his first tooth. Of these we need specify no examples. Of course it would be out of the question to edit twenty volumes of Vesey, after the fashion of Saunders and Yelverton; for it would be a lifelong task, under which the most Atlantean shoulders would break. But on the other hand, Mr. Sumner's great professional resources, would make us feel confident, without knowing anything about the matter, that it would be quite impossible for him to perform his task in the meagre style of the other extreme. But as we have had the privilege of seeing a portion of the work, as prepared by Mr. Sumner for the press, we can assure our readers, that in his annotations he has hit that happy

medium point, equally removed from prolixity and curtness, in which safety and success are to be found. Not only is the law carefully brought down to the present time, by the citation of cases, but wherever subsequent decisions have modified, or altered, or overruled the positions in the text, the fact is so distinctly stated. Wherever the law has been misapprehended, or wherever a principle has been too broadly stated, or wherever a nice distinction has been overlooked, the correction is made in that respectful manner which is always due to the great lights of the law, whose very errors are to be reverently approached. Wherever the occasion offers itself, the editorial note has been expanded, till it assumes something of the port and stature of a brief legal dissertation, in which the topics are discussed in the assured manner of one who feels that his foot is planted upon familiar ground, and whose mind is so saturated with legal knowledge, that it readily pours it forth at the slightest pressure, reminding us of those first "sprightly runnings" of the winepress, extracted by no force, but the mere weight of the grapes. Mr. Sumner has also introduced a new element into his notes. We allude to his biographical notices of the eminent men, whose names occur in the reports, either in a judicial or forensic capacity, and to his occasional historical, political, and bibliographical illustrations of the text. The most time-saving practitioner will not object to find here and there a patch of pleasant reading, breaking the long monotony of argument and decision. For this department of the work, Mr. Sumner is peculiarly qualified. They who have read his contributions to the American Jurist and the Law Reporter, need not be told, that in what may be called the literature of the law, the curiosities of legal learning, he has no rival among us.

In conclusion, we pledge ourselves to our professional brethren, that the publishers have in store for them a work of no common value — a work enriched by various learning, and marked by vigorous legal ability. The practitioner in courts of equity, will find it an excellent manual for daily reference. He will not be vexed with omissions, nor annoyed with the clumsy workmanship of the journeyman bookmaker, nor teased with politic evasions of difficult questions. We hope that the circulation of such books may be attended with an indirect benefit, in disposing the members of the legal profession to a favorable reception of the principles of equity jurisprudence, and the practice of courts of equity; a system which has thrown so many convenient viaducts over the yawning chasms and treacherous morasses of the common law.

Conspiracy to extort Hush-Money. — A case of conspiracy, not altogether without precedent in the judicial records of Boston, but yet of very uncommon occurrence in this part of the country, has been brought twice before the municipal court since the commencement of the present year. Its history, in brief, is as follows:

At the January term of the municipal court of Boston, an indictment was found against Charles Woods, stabler, Nancy J. S. Woods, his wife, and "a third person, to the jurors unknown," charging that they had conspired to inveigle one Dr. W. H. Jones to the dwelling house of the said Woods, for the purpose of there charging him with the crime of adultery, and threatening to prosecute him for that offence, unless he would give up his gold watch, and a note for $1000. It was further alleged, that on the 13th of December, Jones, by invitation of Mrs. Woods, given in pursuance of the conspiracy, visited her at her husband's house, and was then and there compelled to give up his watch and the note, under the threat stated, by Woods and the unknown third person.

The trial commenced on the 18th of January, and it was proved on the part of the prosecution, that Mrs. Woods was an occasional visiter at the store in which the prosecutor was clerk; that she generally came to inquire about some relatives living in Dedham, who were in correspondence with the persons who kept the store. During the year 1843, Mrs. Woods repeatedly invited the prosecutor to call at her house, and on the 12th of December she sent a very urgent message for him to call up on the evening of the 13th. He called accordingly, and found her alone, and, after stating that her hus-

band had gone out, she asked him to take a look through the house, to see how comfortably it was fitted up. She then conducted him to a sleeping room, connected with the parlor, and, after a little conversation, proposed to him to go to bed with her. He urged, as one objection to the proposal, that both were married. She then left the room for a minute or two, and Dr. Jones remained seated. The instant she returned to the room she threw herself upon the bed, and attempted to drag the prosecutor down with her, and almost simultaneously Woods and another man, who afterwards turned out to be Stephen Burley Robinson, rushed in and seized him. They handled him very roughly, made some attempt to undress him, and demanded $2000 from him, under a threat to have him committed to jail for adultery. Jones, after a negotiation of half an hour, secured his liberty by delivering up his watch, and giving his note for $1000. The next day, he represented the case to the police court, but a warrant was refused upon the ground, that a man and wife could not be guilty of the crime of conspiracy, and he could not give the name of the third person, who took part in the act of extortion.

The grand jury, however, when the matter was presented to them, got over this technical objection, by alleging that the husband and wife conspired with a person to the jury unknown, and the court, (Judge Warren) held the indictment to be good.

The defence was conducted with great ingenuity and ability, by J. P. Rogers and G. W. Minns, Esqrs., and they relied on proof that the wife did not act in concert with the other two, but only invited the Doctor to her house, he knowing her intent, for her own lewd indulgence, in the supposed absence of her husband. Woods's regular legal adviser testified, that Woods had long professed to be jealous of his wife, and had applied for advice how to proceed to obtain such evidence of her guilt, as would be sufficient to procure a divorce. Stephen Burley Robinson, cabman, was stated by the counsel to be the third person, and by him they proposed to prove, that he was only engaged by Woods to lie in wait for the wife and such paramour as might call upon her on the evening of the 13th of December, in order that he might be able to testify to her infidelity. On the part of the prosecution, by Mr. Parker, county attorney, it was objected that Robinson was the *particeps criminis* referred to in the indictment, and was therefore rendered incompetent as a witness. After argument, it was held that he was not so described in the indictment, as to be liable to be tried upon it, and therefore he was not technically incompetent. Yet his connection with the case was such as might possibly affect his credibility.

Robinson then testified, that he was a boarder in Woods's family, and, without the knowledge of the wife, had on more than one occasion watched her, at the request of Woods; that when Dr. Jones came to the house, he and Woods were waiting in the basement story, with their shoes off. When Woods asked him for his assistance, on this evening, he stated that he suspected, from his wife's manner, that she expected some person to call upon her, and hence the determination to watch. Robinson stated the seizure of Dr. Jones, and nearly all the details of the surprise, very differently from the doctor's statement. On the other hand, it was proved that Robinson had denied all knowledge of the transaction, and had even stated that he was not at home on the evening when it occurred.

To rebut the defence of "honest jealousy," it was proved that the detection of Mrs. Woods with the prosecutor, by her husband, had not caused any alienation of feeling, and that they afterwards lived together as regularly as ever.

Mr. Parker next proposed to call two witnesses, to prove that Mrs. Woods had previously ensnared other persons to her house, and that Woods and Robinson had endeavored to extort money from them. This evidence was excluded, on the ground that nothing of the kind was alleged in the indictment.

After being out eighteen hours, without coming to an agreement, the jury were discharged. They stood nine for conviction, to three.

In February, a new indictment was found, including Robinson by name, and alleging two other instances of attempted extortion, by similar means;

the persons ensnared by Mrs. Woods being Albert Flint, of Vermont, and James H. Conant, of Methuen, in the spring of 1843. On the trial on this indictment, the testimony, as to the case of Dr. Jones, was the same as on the first trial; and, in addition to that, Flint swore positively that he was invited to her house, by Mrs. Woods, whom he fell in with in the street; that Woods and Robinson surprised him in the room with her; that they demanded his watch and $1000, and that he got clear of them by knocking them both down. The testimony of Conant only implicated Woods and his wife. It was also clearly proved, that Woods had expressed a determination to make money out of his wife's illicit conduct with other men.

Much evidence was introduced, to impeach and sustain the reputations of Flint and Conant, for truth and veracity. A man and woman also testified, that they had seen Doctor Jones and Mrs. Woods on Warren bridge, together, a year before; and evidence for and against the reputations of these witnesses was introduced.

In submitting the case to the jury, Judge Warren charged as follows:

"All confederacies, wrongfully to prejudice another, are misdemeanors at common law, whether the intention is to injure his person, his property, or his character. The act of conspiring, the fraudulent confederacy, agreement, or understanding, is the *gist* of the offence; but whether such confederacy, agreement, or understanding exists, may be left to reasonable inference — it may be collected from all the circumstances of the case. If a series of acts is to be performed, with a view to produce a particular result, he who aids in the performance of any one of these acts, in order to bring about the result, knowing what the object is, must have the intention to effectuate the end proposed; and if he operates with others, knowing them to have the same design, there is, in fact, an agreement between him and them; his criminal intent is not to be distinguished from the intent of those who first formed the plans of the conspiracy. A husband and wife *alone* cannot be convicted of a conspiracy. In order to a verdict, therefore, against Woods and his wife, the jury must be satisfied that Robinson was acting in confederacy with them. Upon this principle, the defendants are entitled to an acquittal on the first count, if there is no evidence tending to show any connection of Robinson with the transactions detailed by Conant. The jury are to consider the evidence applicable to each count, separately and by itself, and independently of that adduced in support of any other count, excepting so far as that goes to show the nature of the relation subsisting between the defendants. It is competent for the jury to acquit the defendants, generally — to find them all guilty upon the second and third counts — or, to find them guilty on one, and not guilty on the others — or, to convict Woods and Robinson on either count, and acquit Mrs. Woods; but they cannot convict Woods and his wife, and acquit Robinson, because, upon the principle before stated, unless Robinson was one of the confederacy, there existed no such conspiracy as is punishable by law."

The jury returned a verdict of guilty, on the counts in which Flint and Jones were named, and not guilty on the one as to Conant.

Mrs. Woods was sentenced to four months in the house of correction, and Woods to three. Robinson was sentenced to two months in the common jail. These sentences were deemed to be remarkably light. The note and watch were given up by the defendants, previous to the passing of sentence.

New Publications. — The press seems to have been prolific of late in new legal publications, but we have space for only a reference to those which we have seen. First of all is the fifth edition of Kent's Commentaries on American Law, which is considerably enlarged, and contains references to the principal decisions down to the present year. This admirable work is so justly appreciated by the whole profession, and it is so generally regarded as an indispensable aid to every lawyer, that we content ourselves with a simple announcement of the last edition, which, we will only add, is equal to any of the other editions in typographical execution.

A Treatise on the Practice of the

Court of Chancery, by Oliver L. Barbour, has been published by Gould, Banks, & Co., New York. It makes two large volumes of about eight hundred pages each. We shall notice it more at length hereafter.

Little & Brown, of Boston, have published Mr. Minot's long-expected Digest of all the Decisions of the Supreme Court of Massachusetts. It makes a noble volume of nine hundred pages, beautifully printed on good type and substantially bound. We have only room to say, for the information of distant subscribers, that the price is seven dollars and a half.

We have received a Report of the Trial of Lucian Hall and two others for the murder of Mrs. Lavinia Bacon, before the Middlesex Superior Court, at Middletown, Connecticut. It makes a pamphlet of forty pages.

Motch-Pot.

It seemeth that this word *hotch-pot*, is in English a pudding; for in this pudding is no commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

The present number of our journal being the commencement of a new volume, we intended to have made a few remarks on matters personal to ourselves; but we readily omit them, for the present at least, in order to make room for our contributors who occupy a large portion of our space this month. Although the present number is larger than usual by sixteen pages, we are obliged to leave out several articles which have been prepared for it, and some interesting decisions. It is with regret that we omit the very able opinion of Chief Justice Gibson, in the case of the *Monongahela Navigation Company* v. *Coons*, of which the marginal note, or abstract, is given on page 33. In the next number we hope to find room for a review of the law journals in the United States, past and present, and, in that connection, we trust we shall be pardoned for alluding to our own journal — its success and prospects.

We learn from the Portland American that general Fessenden recently appeared before the district court, and moved that a *colored gentleman* from Boston, who was then with him, be admitted to practise as an attorney and counsellor at law, in the courts of Maine. The motion was made under the new law, which makes all citizens of good moral character eligible to admission. The necessary certificate was produced, but the court refused the motion, on the ground that the candidate was not in fact a citizen. A successful application will probably be made at the October term, adds the American.

Among the works advertised by A. Maxwell and Son, London, as in press, is professor Greenleaf's admirable Treatise on Evidence, "Adapted to the use of the English Student and Practitioner. By John Pitt Taylor, Esq., of the Middle Temple, Barrister at Law." We understand that professor Greenleaf is still occupied with the preparation of his second volume, on the evidence applicable to particular issues.

In Coxe's Memoirs of the Pelham Administration, (vol. i. p. 448,) there is a letter from Pelham to his brother, the Earl of Newcastle, in which he quotes the following remark of Algernon Sidney, the night before his execution; "Nephew, I value not my own life a chip, but what concerns me is, that the law which takes away my life, may hang every one of you whenever it is thought convenient."

Lord Thurlow, when taunted by the duke of Grafton with his humble origin, and the recent date of his peerage, replied, "The noble duke cannot look before him, behind him, or on either side of him, without seeing some noble peer, who owes his seat in this house to his successful exertions in the profession to which I belong. To all these noble lords the language of the noble duke is as applicable, and as insulting, as it is to myself."

We have received the printed decision of the superior court of New Hampshire, in the case of *Kittredge* v. *Warren*, in which it was held that an attachment on mesne process, before any act of bankruptcy or petition by the debtor, is a lien or security upon property, and within the proviso of the second section of the bankrupt act. The opinion, which is very elaborate, is by Parker, C. J.

Chancellor Walworth has been nominated to the vacant seat on the bench of the supreme court of the United States. It is intimated in the newspapers that the senate will not act upon the nomination at this session; and that Mr. Crittenden will probably have the place in the event of Mr. Clay's elevation to the presidency.

A writer in the New York Evening Post lately gave a somewhat elaborate account of Mr. Webster's manner of blowing his nose in the supreme court of the United States! It appears to have been done very deliberately, and while one of the justices was addressing the bar.

We have it from the highest authority, that the late Mr. Upshur, while secretary of the navy, made an order prohibiting the purchase for naval libraries, of Kent's Commentaries, Story's Commentaries on the Constitution, and Gibbon's Decline and Fall.

While these sheets are passing through the press, we have a rumor that Chief Justice Gibson is lying dangerously ill in Philadelphia.

Obituary Notices.

PETER S. DU PONCEAU.

It was our intention to have given a more extended notice of this distinguished jurist and scholar, than we are able to do at this time; but we cannot let the present number go out without expressing our deep sense of the loss which our country, and especially the professional and literary portion, has sustained in the death of this eminent and excellent man; and, in doing this we shall, for some particulars of his life, avail ourselves of an obituary notice of him lately published in the Boston Courier.

Mr. Du Ponceau was born on the 3d of June 1760 in the *Isle of Ré*, off the west coast of France. His family was of the Catholic religion; and he was himself intended for the church, and was placed under the instruction of an ecclesiastic with that view, at an early age; but his acute and active mind soon began to argue theological questions with his instructer; their discussions at length ended in an open rupture. Mr. Du Ponceau relinquished his theological studies, and eventually became a protestant. His family enjoyed distinction in France; we believe his father had some title of nobility, and the Marquis Du Ponceau (who died not long since in Paris) was his brother. This latter visited the United States, about the commencement of the French Revolution, and, as we have been informed, remained as decided a royalist, as our adopted countryman did a republican.

It is well known that Mr. Du Ponceau's intimate knowledge of the English language, was the occasion of his being invited to come to this country, as Secretary to Baron Steuben, in the year 1777; he continued in the American army with that distinguished officer about three years, and then had an appointment as an Under Secretary in the War Department, the duties of which, though a very young man, he discharged with unusual ability. At the close of the war, he determined to enter upon the profession of the law; and notwithstanding the disadvantages of foreign birth and a foreign mother-tongue, in a few years he obtained a place in the first rank at the Philadelphia Bar. His name is familiar to all lawyers, in all the important cases decided in the courts of the State and of the United States, reported by Dallas and his successors, for a long series of years. Among his contemporaries at the Bar, his extensive and accurate knowledge of the Civil and Foreign Law gave him many advantages in the discussion of the great questions connected with international and mercantile law, which were continually occurring while the European nations were at war and the United States maintained a neutral position, and for which our lawyers, generally, were not then prepared.

In addition to his numerous learned and able arguments in the Reports above referred to, Mr. Du Ponceau contributed in various modes to advance the science of jurisprudence in this country. He was, we believe, the originator of the *Law Academy* in Philadelphia, an institution, which has had a beneficial influence in giving a proper direction to legal studies and discipline; he was chosen the first Provost of that Academy, and presided over it for many years. The younger members of the profession were much in the habit of consulting him on all occasions, and of submitting to him any papers which they intended for publication; and the treasures of his well-stored mind have in this manner been diffused among us, when their source was unknown to the public.

He also found leisure to make some valuable contributions to our jurisprudence by publications of his own; they were few in number, but valuable, though rather of a scientific, than of a merely practical character. We can recollect the following, but probably our list will be found imperfect.

Translation of Bynkershoek's Quæstiones Juris Publici, under the title of the Law of War, with highly valuable notes of his own, published in 1810; Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States — 1824; the article "Law" in the American edition of the Edinburgh Encyclopædia; Preface to Hall's Admiralty Practice — 1809; Review of Chancellor Kent's Commentaries, published in Walsh's American Quarterly Review; Discourse at the opening of his Law Academy in Philadelphia, in 1821; Brief View of the Constitution of the United States — 1834. To these we may add the following unpublished manuscripts: A Trans-

lation with valuable notes, of Dalyarney's German Treatise on the Law of Nations, made many years ago, and lent to Judge —— of New Orleans, in whose hands it probably is at this time: Translation of Rayneval's work on the rights of Neutral Powers, and the Principle of the Armed League (Armed Neutrality) of 1781, that "Free Ships make Free Goods." This, we hope, will be found in the Library of the Philosophical Society at Philadelphia, where we believe he had deposited it.

We do not give this as a complete list of his works relating to jurisprudence, but we believe it to be nearly correct. We might in connection with these unpublished works, have added his elaborate professional opinions on great questions of constitutional and international law, which were in fact valuable dissertations upon the cases submitted. His last opinion of this description was given in the case of Mr. Levy, the delegate from Florida, whose seat, as the representative of a territory, in congress, was contested in 1841, and of which we gave some account in a former number of this journal. (5 Law Reporter, 40.)

In his translation of Bynkershoek, he was the first to suggest the application of the distinction between an *absolute* and a *qualified* neutrality to the case of the United States and France, considering our neutrality to be not absolute, but qualified by the treaty of 1778. His remarks on the doctrine of the *jus postliminii*, in the same work, present some new views, which, if we rightly recollect, are adopted by Mr. Wheaton in his useful work on International Law. We believe too, that Mr. Du Ponceau was the first to promulgate the opinion (in that work also) that *piracy* might be committed on land as well as at sea; which principle was afterwards incorporated into the act of congress on that subject. And, generally speaking, there can be no doubt, that his profound legal knowledge, operating through different channels, has directly or indirectly had an important influence on some parts of our jurisprudence.

We have but little space left for remarks upon Mr. Du Ponceau's literary acquirements, which have added to the fame of our country and have given him a proud eminence among the scholars of Europe. His taste led him to the cultivation of *General Philology*, a science, which has employed the first intellects of the Old World from the time of that universal genius, Leibnitz, to that of the late illustrious Baron William Humboldt, and which has never been cultivated with so much ardor and success as at the present moment. For some particulars of his labors in this department of knowledge we are obliged to refer to the obituary notice above mentioned; and can here only add, that his rare knowledge of various languages enabled him to prosecute the science of Philology with great success. With the languages of Europe from Germany to Italy he was well acquainted; and in early life he had studied the *Russian*, which at that period was a *terra incognita* to scholars in general; and on his arrival in this country he kept his journal in the French language, written in the *Russian character*. He was also a good classical scholar; and we do not recollect any individual, who had always at his command, a greater stock of those maxims of wisdom, and those grand and ennobling sentiments, the invaluable fruits of well-directed classical studies, which the great statesman of England and friend of American liberty, Lord Chatham, enjoins with so much earnestness, in his well known letters to his young relative at the university: "I hope" says he "you taste and love those authors (Homer and Virgil) particularly. You cannot read them too much; . . . . . they contain the finest lessons for your age to imbibe; lessons of honor, courage, disinterestedness, love of truth, command of temper, gentleness of behavior, humanity, and in one word VIRTUE, in its true signification."

Mr. Du Ponceau's fondness for these studies continues to the latest period of his life; and no longer ago than the last autumn he wrote to a friend in this city in the following earnest tone in relation to a recent and most interesting publication on the Life and writings of Horace: "I am now reading a French book, which I warmly recommend to you to send for and add to your library. It is entitled — "Histoire de la vie et des poesies d'Horace" — by Baron Walckenaer, 2 vols. 8vo. It is a delightful work; England has nothing to compare to it, except perhaps Middleton's *Life of Cicero*. You are, I am sure, a lover of Horace. This charming book of Walckenaer, with your Horace on your table, will be the delight and comfort of your old age. *Experto crede.*"

We ought not to omit mentioning, that among the varied attainments of Mr. Du Ponceau, was his knowledge of the *science* of music; he was not practically skilled in it, but he had a knowledge of counterpoint very rarely to be found among amateurs; and he was familiar with the compositions of the great masters, Haydn, Mozart, Beethoven, and others of their school, upon whose works his taste was formed. In this also, as in all his studies, his ardent American feeling stimulated him to look for merit among our own countrymen, who have hitherto established but slight claims to the rank of *composers*. Only a few years ago he made an effort to collect the publications of our well known *Billings*, whose *melodies* highly pleased him, though he was fully sensible of that author's lamentable want of skill in the science of *harmony*.

His varied acquirements and rare talents procured for him the well-deserved honor of being elected into the most distinguished learned societies of Europe and our own country; to which distinction he attached a peculiar value when conferred by one of our own societies. Indeed, he was in his feelings thoroughly American; and he has been known, on some occasions, to deem it nothing less than an affront to be considered as a foreigner.

With these eminent intellectual endow-

ments were united a purity and elevation of moral worth, that are rarely to be found; and we may justly apply to him the sentiment of his favorite Horace,—

> ——————Cui Pudor, et Justitiæ Soror
> Incorrupta Fides, nudaque Veritas,
> Quando ullum inveniet parem?

Mr. Du Ponceau had reached a venerable old age, having nearly completed his eighty-fourth year; and died, after a short illness, at his residence in Philadelphia, on the 1st of April last, having faithfully and conscientiously employed, for the good of his fellow man, those eminent talents and virtues, which a beneficent Providence had bestowed upon him.

Died, at his town residence in New York City, on Sunday, April 7, Major General Morgan Lewis, aged ninety years. He was born in New York, in October, 1754. His father, Francis Lewis, was a merchant of New York and a signer of the declaration of independence. Major Lewis was graduated at Princeton College, in 1773, with the intention of embracing the profession of the law. But, influenced by the patriotic ardor of the times, he was among the first to volunteer in the cause of independence, and joined the American army at Boston, after the battle of Bunker Hill, as a member of a company of Pennsylvania riflemen. He remained with the army under the command of Washington, until Boston was evacuated by the British. He then joined a New York regiment, with which he was sent to Canada in 1776, after the retreat of the American army from New York. He was at Ticonderoga before the advance of Burgoyne, upon his celebrated march from Canada to Saratoga; and on the retreat of the Americans before the troops of that general, Lewis joined the army which was forming to oppose him. At this time he received a commission of quarter-master general of the army of the North, with the rank of colonel, from the continental congress. He was actively engaged in the several battles which followed, and which eventuated in the capitulation of the British forces to the Americans. He was next engaged in an expedition, led by General George Clinton, up the Mohawk valley, against the refugees and Indians, who were led by Brandt, the celebrated Indian warrior. Colonel Lewis led the advance in the conflict at Stone Arabia, and those bands of marauders were cut to pieces and dispersed.

After the conclusion of peace, Colonel Lewis entered New York with the American army under Washington, and, for the first time in seven years, set foot in his native place. He immediately commenced the practice of the law, and in a short time acquired a distinguished reputation as a lawyer. He did not, however, lose his military predilections, and, at the inauguration of Washington, he took the command of the military display. He was afterwards appointed a judge of the supreme court of New York, which office he held until 1804. At that time, there being a high party excitement between the friends of Jefferson and Burr, Judge Lewis was induced to accept the nomination of Governor, in opposition to Burr, and was elected by a handsome majority. It was out of this election that the quarrel arose between Hamilton and Burr, which resulted in a duel, and the death of the former. At the next election, Judge Lewis was defeated by Daniel D. Tompkins. He was shortly after elected to the senate of the state, from the city of New York. At the commencement of the last war, he was appointed by President Madison, quarter-master general in the army. He soon after received his commission as major general. At the age of sixty, he was again ordered to the frontiers, over the ground of his early career in arms. He landed on the Canadian shore, in the army commanded by Dearborn, and captured Fort George. During the remainder of the war, he was in command of the New York station. After the termination of hostilities, he retired from public life, and resided alternately at a beautiful country residence in the county of Dutchess, and his house in the city of New York. Major General Lewis was gentlemanly in his manners, and distinguished for urbanity, kindness and dignity, in every station which he filled. At the time of his death, he was President General of the Society of Cincinnati, and the last surviving colonel of the army of the revolution.

At his lodgings in the Merchants Hotel, Philadelphia, on the evening of Sunday, April 21, at a quarter past nine o'clock, Hon. Henry Baldwin, one of the associate justices of the supreme court of the United States, aged about sixty-five. His disease was paralysis, of which he suffered a severe attack on the Monday previous, and under which he gradually sunk.